No. **0843** Smithers Registry

In the Supreme Court of British Columbia

**Between:**

DELGAMUUKW, also known as
KEN MULDOE, suing on his own behalf
and on behalf of all the members of the
HOUSE OF DELGAMUUKW, and others

**Plaintiffs**

**And:**

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF BRITISH
COLUMBIA and THE ATTORNEY
GENERAL OF CANADA

**Defendants**

# REASONS FOR JUDGMENT

No. 0843
Smithers Registry

---

## In the Supreme Court of British Columbia

91-04189/

**Between:**

DELGAMUUKW, also known as
KEN MULDOE, suing on his own behalf
and on behalf of all the members of the
HOUSE OF DELGAMUUKW, and others

**Plaintiffs**

**And:**

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF BRITISH
COLUMBIA and THE ATTORNEY
GENERAL OF CANADA

**Defendants**

---

**Reasons for Judgment of The Honourable Chief Justice Allan McEachern.**

**Dates of Trial:** 374 Days between May 11, 1987 and June 30, 1990

**Counsel:**

Stuart Rush, Peter Grant, Louise Mandell, Michael Jackson, Murray Adams, Stanley Gunther, Leslie Pinder, Michael Fleming and David Paterson for the Plaintiffs

D.M.M. Goldie, Q.C., C.F. Willms, P.G. Plant, N.J. Prelypchan, J.M. Mackenzie, T.A. Sigurdson, L.A. Fenlon and D.J. O'Byrne for the Attorney General of British Columbia

J.A. Macaulay, Q.C., M. Marvyn Koenigsberg, Loryl D. Russell, Murray T. Wolf and Michael W. Frey for the Attorney General of Canada

**Date:** Friday, March 8, 1991.

# INDEX

**SUMMARY OF FINDINGS AND CONCLUSIONS** vii

**PART 1. INTRODUCTION** 1

**PART 2. THE CLAIM AND THE TERRITORY: AN OUTLINE** 5

**PART 3. DEFINITIONS** 15

1. Ownership 15
2. Aboriginal Rights 15
3. Indian Title 16
4. Jurisdiction 16
    - (a) Jurisdiction over land 16
    - (b) Jurisdiction over people 16
5. Aboriginal Interest 16

**PART 4. AN HISTORICAL OVERVIEW** 17

1. The Pre-Historic Period 17
2. Early North American Exploration 19
3. The 1700's 21
4. The Proto-Historic Period 23
5. The Historic Period 25
6. The Colony of British Columbia 26

**PART 5. THE PLAINTIFFS** 31

1. Present Social Organization 31
2. Band Councils 35
3. Tribal Councils 36

**PART 6. THE NATURE OF THE ACTION** 39

1. The Plaintiffs 39
2. The Plaintiffs' Claims against Canada 43
3. The Counterclaim of the Province 43

**PART 7. SOME COMMENTS ON EVIDENCE** 45

**PART 8. THE HISTORY OF THE GITKSAN AND WET'SUWET'EN PEOPLE** 53

1. General 53
2. Specific Kinds of Evidence 54
    - (a) Hearsay, and Declarations by Deceased Persons 54
    - (b) Recollections of Aboriginal Life 56
    - (c) Adaawk and Kungax 57
    - (d) Archaeological Evidence 59
    - (e) The Seeley Lake Medeek 61
    - (f) Genealogical Evidence (Ms. Harris) 67
    - (g) Ms. Marsden's Evidence (Origins and Migrations) 68
    - (h) Linguistic Evidence (Dr. Rigsby and Dr. Kari) 68
    - (i) Historical Geography (Dr. Ray) 73
3. Conclusions on the History of the Gitksan and Wet'suwet'en People 75

**PART 9. THE REMAINING LEGAL ISSUES (SHORT FORM)** 77

**PART 10. THE CREATION OF ABORIGINAL INTERESTS** 79

1. The Underlying Title of the Crown 79
2. The Province's Preliminary Position 81
3. In What Circumstances do Aboriginal Interests Arise? 82
    - (a) By long time aboriginal use of specific territory 82
    - (b) By the Royal Proclamation, 1763 83
        - (i) Geography 84
        - (ii) History 87
        - (iii) Analysis 92
4. Conclusions 98

**PART 11. THE RELEVANT POLITICAL HISTORY OF BRITISH COLUMBIA IN THE PRE-COLONIAL AND COLONIAL PERIOD** 99

**PART 12. THE RELEVANT POLITICAL HISTORY OF THE PROVINCE FROM UNION WITH CANADA IN 1371 TO THE PRESENT** 131

**PART 13. THE AUTHORITIES, AND SOME COMMENTS** 187

1. Introduction 187
2. The Authorities 188
    - (1) R. v. St. Catherine's Milling and Lumber Company 189
    - (2) Calder v. Attorney-General of British Columbia 194
    - (3) The Hamlet of Baker Lake v. Minister of Indian Affairs, and Northern Development 197
    - (4) Guerin v. the Queen 199
    - (5) R. v. Sioui 201
    - (6) R. v. Sparrow 203
3. Summary of Authorities 208

**PART 14. THE PLAINTIFFS' SPECIFIC CLAIMS FOR ABORIGINAL INTERESTS** 209

1. The Status of the Plaintiffs in this Action 209
2. Aboriginal Jurisdiction and Ownership 210
    - (a) The Relevant Date 211
    - (b) Aboriginal Jurisdiction and Ownership Before British Sovereignty 212
        - (i) Aboriginal Jurisdiction or Sovereignty 214
        - (ii) Aboriginal Ownership 221
3. The Effect of British Sovereignty 223
4. Conclusions on Jurisdiction and Ownership 224
5. Aboriginal Rights 225
    - (a) The Requirements for Aboriginal Rights 225
        - (i) Ancestors in an Organized Society 226
        - (ii) The Occupation of Specific Territory 227
        - (iii) The Exclusion of Other Organized Societies 227
        - (iv) Occupation Established at Time British Sovereignty Asserted 227
        - (v) Long Time Aboriginal Practices 227
    - (b) The Nature of Aboriginal Rights 227
        - (i) Generally 227
        - (ii) Commercial Activities 228
        - (iii) Exclusivity 229
6. Conclusions on Aboriginal Rights 231

**PART 15. EXTINGUISHMENT AND FIDUCIARY DUTIES** 233

1. General Principles 233
2. Extinguishment of Aboriginal Rights of Jurisdiction and Ownership 241
    - (a) Aboriginal Jurisdiction 241
    - (b) Aboriginal Ownership of Land 242
3. Extinguishment of Aboriginal Rights 243
4. Fiduciary Duties 245
5. Conclusions 254

**PART 16. DAMAGES** 255

**PART 17. THE LANDS SUBJECT TO ABORIGINAL RIGHTS AT THE DATE OF BRITISH SOVEREIGNTY** 257

1. General 257
2. The External Boundary 257
3. The Internal Boundaries 259
   - (a) General Discussion 259
   - (b) The Preparation of Territorial Affidavits 264
   - (c) Discussion 264
4. Uncertainties 267
5. Evidence about Discrete Territories 268
6. The Details 269
7. Conclusions on Internal Boundaries 273
8. General Aboriginal Rights 274
   - (a) Alternative No. 1 275
   - (b) Alternative No. 2 275
     - (i) Gitksan 275
     - (ii) Wet'suwet'en 276
   - (c) Alternative No. 3 277
     - (i) Gitksan 277
     - (ii) Wet'suwet'en 278
9. Conclusion 278

**PART 18. ABANDONMENT OF ABORIGINAL RIGHTS** 283

1. Discussion 283
2. Gitksan Territories 285
3. Wet'suwet'en Territories 289
4. Conclusions on Abandonment 291

**PART 19. OTHER DEFENCES** 293

**PART 20. THE COUNTERCLAIM OF THE PROVINCE** 295

**PART 21. THE JUDGMENT IN THIS CASE** 297

**PART 22. SOME COMMENTS** 299

**MAPS**

**MAP 1.** Generalized Map of British Columbia showing Territories claimed by Gitksan and Wet'suwet'en Peoples (not to scale). 6

**MAP 2.** Reduced copy of map of the Territory showing an early version of External Boundary with some principal features added (Ex. 1243). 7

**MAP 3.** Reduced copy of Overlay Map (Ex. 646-9A) showing Gitksan Internal Boundaries. 8

**MAP 4.** Reduced copy of Overlay Map (Ex. 646-9B) showing Wet'suwet'en Internal Boundaries. 9

**MAP 5.** Further copy of Map 2 showing areas subject to Plaintiffs' aboriginal rights at time of British sovereignty. 281

**SCHEDULES** 303

**SCHEDULE 1.** Itinerary of view of territory June, 1988 305

**SCHEDULE 2.** Description of plaintiffs, from Amended Statement of Claim 308

**SCHEDULE 3.** Copy of Royal Proclamation, 1763 311

**SCHEDULE 4.** Extract of submission of province on oral histories 315

**SCHEDULE 5.** Territorial Affidavit of William Blackwater, (Ex. 605) 331

**SCHEDULE 6.** Summaries of Territorial Arguments 341

# SUMMARY OF FINDINGS AND CONCLUSIONS

1. The last Great Ice Age, which lasted many thousands of years, covered nearly all of British Columbia. It ended about 10,000 years ago.

2. The origins of the Gitksan and Wet'suwet'en and other aboriginal peoples of the north-west part of the province are unknown. It is generally believed they migrated here from Asia.

3. There is archaeological evidence of human habitation in the territory as long as 3,000 to 6,000 years ago. This is limited to village sites both at the coast at Prince Rupert harbour and at a few locations alongside the Skeena and Bulkley Rivers. The evidence does not establish who those early inhabitants (or visitors) were.

4. The plaintiffs are 35 Gitksan and 13 Wet'suwet'en hereditary chiefs who have brought this action alleging that from time immemorial they and their ancestors have occupied and possessed approximately 22,000 square miles in north-west British Columbia ("the territory"), and that they or the Indian people they represent are entitled, as against the province of British Columbia, to a legal judgment declaring:

- (a) that they own the territory;
- (b) that they are entitled to govern the territory by aboriginal laws which are paramount to the laws of British Columbia;
- (c) alternatively, that they have unspecified aboriginal rights to use the territory;
- (d) damages for the loss of all lands and resources transferred to third parties or for resources removed from the territory since the establishment of the colony; and
- (e) costs.

5. No relief is claimed by the plaintiffs in this action against Canada which was joined as a defendant for procedural reasons. The action against Canada is dismissed. In this Summary, "Crown" refers to the Crown in right of the Colony or Province of British Columbia except where the context indicates otherwise.

6. The plaintiffs allege the territory is divided into 133 separate territories (98 Gitksan, and 35 Wet'suwet'en), and each of these separate territories is claimed by an hereditary chief for his House or its members. Some chiefs claim several territories, and some chiefs claim territories for other chiefs who are not plaintiffs.

7. Map 1 on p. 6 of the judgment is a generalized map of the province showing the general location of the territory. Map 2 at p. 7 is a reduction of a detailed map of the territory. It shows the approximate external boundary of the territory. The individual

territories claimed by the Gitksan and Wet'suwet'en chiefs are shown on maps 3 and 4, at pp. 8 and 9.

8. Aboriginal interests arise (a) by occupation and use of specific lands for aboriginal purposes by a communal people in an organized society for an indefinite, long period prior to British sovereignty; or (b) under the **Royal Proclamation, 1763.**

9. Aboriginal rights under (a) above arise by operation of law and do not depend upon statue, proclamation or sovereign recognition. Such rights existing at the date of sovereignty exist and continue at the Crown's "pleasure." Unless surrendered or extinguished, aboriginal rights constitute a burden upon the Crown's title to the soil.

10. **The Royal Proclamation, 1763** has never applied to or had any force in the Colony or Province of British Columbia or to the Indians living here.

11. Linguistics, genealogy, history, and other evidence establish that some of the ancestors of some of the plaintiffs or the peoples they represent have been present in the territory for an indefinite, long time before British sovereignty.

12. These early ancestors lived mainly in or near several villages such as Gitanka'at, Gitwangak, Kitsegucla, Kispiox, Ksun, Old Kuldo, New Kuldo, Gitangasx and possibly at Gitenmaax (Hazelton) which are all on the Skeena River; at Kisgegas on the Babine River; and at Hagwilget and Moricetown on the Bulkley River. Each of these villages, six of which are now abandoned, were strategically located at canyons or river junctions where salmon, the mainstay of their diet, could most easily be taken. Further, these early ancestors also used some other parts of the territory surrounding and between their villages and rivers, and further away as circumstances required, for hunting and gathering the products of the lands and waters of the territory for subsistence and ceremonial purposes.

14. Prior to the commencement of the fur trade these early aboriginals took some animals by snares, dead falls and other means, but there was no reason for them to travel far from their villages or rivers for this purpose, or to take more animals than were needed for their aboriginal subsistence.

15. There may have been sparse incursions of European trade goods into the territory overland from the east or south, or from unknown seaborne sources (perhaps from Asia) before the arrival of Capt. Cook at Nootka on Vancouver Island in 1778. That date, however, or more particularly the start of the sea otter hunt on the north Pacific coast which started within the following 5 years, was the likely start of European influences in north-west North America.

16. The fur trade in the territory began not earlier than the establishment of the first Hudson's Bay posts west of the Rockies (but east of the territory), by Simon Fraser in 1805-06, and more probably a few years after that.

17. Trapping for the commercial fur trade was not an aboriginal practice. Apart from commercial trapping, there were no significant changes in aboriginal practices between first contact with European influences within a few years on either side of 1800 and the assertion of British sovereignty. The use of modern implements such as mechanical traps and guns since the time of contact does not change the nature of an aboriginal right.

18. The law of nations and the common law recognize the sovereignty of European nations which established settlements in North America.

19. Great Britain asserted sovereignty in the territory not earlier than 1803, and not later than either the **Oregon Boundary Treaty, 1846,** or the actual establishment of the

Crown Colony of British Columbia in 1858. For the purposes of this case it does not matter precisely when sovereignty was first asserted.

20. The title to the soil of the province became vested in the Imperial Crown (Great Britain) by operation of law at the time of sovereignty. The plaintiffs recognize this title, but argue that their claims constitute an interest which is a burden upon the title of the Crown.

21. The purpose of sovereignty and of creating the Colony of British Columbia in 1858 was to settle the colony with British settlers and to develop it for the benefit of the Crown and its subjects.

22. The aboriginal interests of the post-contact ancestors of the plaintiffs at the date of sovereignty were those exercised by their own more remote ancestors for an uncertain long time. Basically these were rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes.

23. These aboriginal interests did not include ownership of or jurisdiction over the territory. Those claims of the plaintiffs in this action are dismissed.

24. But for the question of extinguishment, the plaintiff's aboriginal sustenance rights would have constituted a legally enforceable, continuing burden upon the title of the Crown.

25. Upon the establishment of the colony, the Crown, both locally and in London, enacted a number of laws providing: (a) that all the lands of the colony belonged to the Crown (which would be the Imperial Crown at that time); (b) that the laws of England applied in the Colony; (c) giving the Governor and later a Legislative Council authority to grant the lands of the colony to settlers; and (d) authorizing the Crown through the Governor to make laws and exercise legal jurisdiction over the colony including the territory.

26. The policy of the Colony of British Columbia was (a) to allot lands to the Indians for their exclusive use, called reserves, comprising their village sites, cultivated fields and immediately adjacent hunting grounds; (b) to encourage settlement by making land available for agriculture and other purposes; and (c) to permit Indians, along with all other citizens, to use the vacant Crown lands of the colony.

27. Part (a) of this policy did not usually work as well as intended. Reserves were mainly allotted in the territory in the 1890's and they were "adjusted" by a Royal Commission in 1912-14. Although reserves in the territory included most occupied villages, they were very small because it was thought secure access to strategic fishing sites was more important than acreage. The evidence does not fully explain why the Indians of the territory did not receive strategic sites **and** acreage except that the Indians often failed or declined to participate in the allotment process.

28. It is the law that aboriginal rights exist at the "pleasure of the Crown," and they may be extinguished whenever the intention of the Crown to do so is clear and plain.

29. The pre-Confederation colonial enactments construed in their historic setting exhibit a clear and plain intention to extinguish aboriginal interests in order to give an unburdened title to settlers, and the Crown did extinguish such rights to all the lands of the colony. The plaintiffs' claims for aboriginal rights are accordingly dismissed.

30. At the same time, the Crown promised the Indians of the colony, which applies also to the territory, that they (along with all other residents), but subject to the general

law, could continue to use the unoccupied or vacant Crown land of the colony for purposes equivalent to aboriginal rights until such lands were required for an adverse purpose. Further, this promise extends to any alienated lands which are returned to the status of vacant Crown lands. Thus, lands leased or licensed for logging, for example, become usable again by Indians and others when such operations are completed.

31. The unilateral extinguishment of aboriginal interests accompanied by the Crown's promise and the general obligation of the Crown to care for its aboriginal peoples created a legally enforceable fiduciary, or trust-like duty or obligation upon the Crown to ensure there will be no arbitrary interference with aboriginal sustenance practices in the territory.

32. When the colony joined the Canadian Confederation in 1871 the charge of Indians and Indian lands was assumed by the Dominion (Canada); all colonial lands, subject to existing "interests," accrued to the province; and the province agreed to furnish whatever land was required for reserves. In 1924 Canada acknowledged that British Columbia had satisfied its obligations with respect to furnishing lands for Indian reserves.

33. The promise made and obligation assumed by the Crown in colonial times, while not an "Interest" to which Crown lands are subject, can only be discharged by the province and continues to the present time as a duty owed by the Crown subject to the terms mentioned above.

34. Since Confederation the province has had: (a) title to the soil of the province; (b) the right to dispose of Crown lands unburdened by aboriginal title; and (c) the right, within its jurisdiction under s. 92 of the Constitution, to govern the province. All titles, leases, licenses, permits and other dispositions emanating from the Imperial Crown during the colonial period or from the Crown in right of the province since Confederation are valid in so far as aboriginal interests are concerned. The province has a continuing fiduciary duty to permit Indians to use vacant Crown land for aboriginal purposes. The honour of the Crown imposes an obligation of fair dealing in this respect upon the province which is enforceable by law.

35. The plaintiffs, on behalf of the Gitksan and Wet'suwet'en people are accordingly entitled to a Declaration confirming their legal right to use vacant Crown land for aboriginal purposes subject to the general law of the province.

36. The orderly development of the territory including the settlement and development of non-reserve lands and the harvesting of resources does not ordinarily offend against the honour of the Crown. This is because the province has many other duties and obligations additional to those owed to Indians and because (a) the territory is so vast; (b) game and other resources are reasonably plentiful: and (c) most Indians in the territory are only marginally dependent upon sustenance activities.

37. The right of Indians to use unoccupied, vacant Crown land is an not an exclusive right and it is subject to the general law of the province. The Crown has always allowed non-Indians also to use vacant Crown lands.

38. For the reasons stated in the Reasons for Judgement, it is not advisable to specify the precise rules that would govern the relationship between the Indians and the Crown. Instead, that question should be left to the law relating to fiduciary duties which provides ample legal remedies.

39. Part 15 of this judgment describes the circumstances which the province and the Indians should take into consideration in deciding whether any proposed Crown action may constitute a breach of its fiduciary duty to Indians. Generally speaking, the operative word is "reconciliation" rather than "rights" or "justification."

40. As the Crown has all along had the right to settle and develop the territory and to grant titles and tenures in the territory unburdened by aboriginal interests, the plaintiffs' claim for damages is dismissed.

41. If I have erred on the question of extinguishment, and the plaintiffs aboriginal interests or any of them are not extinguished, the evidence does not establish the validity of individual territories claimed by Gitksan and Wet'suwet'en Chiefs. Instead, therefore, the claim for aboriginal rights in such circumstances would be allowed not for chiefs or Houses or members of Houses, but rather for the communal benefit of all the Gitksan and Wet'suwet'en peoples except the Gitksan peoples of the Kitwankool Chiefs who did not join in this action.

42. These aboriginal rights, if any, would attach not to the whole territory but only to the parts that were used by the plaintiffs' ancestors at the time of sovereignty. The parts so used by each of the plaintiff peoples are defined in Part 16, and they are shown on Map 5 at p. 281.

43. The Counter Claim of the province, which was brought for procedural reasons, is dismissed.

44. Because of the importance of the matter, the divided success the parties have achieved, and other reasons mentioned in the judgment, no order is made for costs.

45. The specific judgment of the Court is detailed in Part 21.

46. In Part 22 I have made some comments about Indian matters.

# PART 1

## INTRODUCTION

This has been a long trial.

After numerous pre-trial proceedings, including taking the commission evidence of many elderly plaintiffs, interlocutory applications and appeals, the trial began in Smithers on May 11, 1987.

After 318 days of evidence, mainly at Vancouver but partly at Smithers, the evidence was substantially completed on February 7, 1990.

Legal argument began in Smithers on April 2, 1990 and continued there for 18 days. Argument continued in Vancouver for a further 38 days, and the trial ended there on June 30, 1990.

A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "Word Spellers" to assist the Official Reporters were required for many witnesses; a further 15 witnesses gave their evidence on Commission; 53 Territorial Affidavits were filed; 30 deponents were cross-examined out of Court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the provinces' 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of Reply Argument were left with me during that stage of the trial.

The Plaintiffs filed 23 large binders of authorities. The province supplemented this with 8 additional volumes, and Canada added 1 volume along with several other recent authorities which had not then been reported.

The evidence is intensely detailed which is why, in part, this judgment is so inordinately long. I have had some difficulty with the spelling of some unusual words for which the material suggests there may be more than one correct version. For example some writers such as Dr. Kari spell "Athabaskan" thusly, while others spell it with a "p". I have adopted Dr. Kari's spelling. With most difficult words I have attempted uniformity but I doubt if I have been completely successful.

I visited many parts of the territory which is the principal subject of this case during a 3-day helicopter and highway "view" in June 1988 which is described in Schedule 1 to this judgment. I also took many automobile trips into the territory during many of the evenings of the nearly 50 days I sat in Smithers. These explorations were for the purpose of familiarizing myself, as best I could, with this beautiful, vast and almost empty part of the province.

Needless to say, this judgment has been a difficult one to prepare. I hope the Summary is useful, but if there is any conflict between these Reasons for Judgment and the Summary then the former must prevail.

I wish to record my sincere appreciation to all counsel and their staffs who have laboured mightily to assist me to receive, preserve, retrieve and understand such a huge quantity of information. I greatly appreciate and admire their industry, ingenuity and legal skill. I owe a great debt of gratitude to the Official Reporters who laboured under numerous difficulties but still prepared excellent transcripts. In this case, more than with many others, the Official Reporters had the most difficult job in the Courtroom.

This case is mainly about land. But there are also claims for jurisdiction and damages. In a moment I shall endeavour to describe the parties and the nature of the case. Before doing so I wish to mention that this has also been a political trial.

The plaintiffs, the aboriginal people who now live in parts of the territory I shall describe, sincerely believe that they own and have a legal right to govern this vast territory by reason of long use and possession. They harbour a great sense of injustice and resentment that they have waited so long for their aboriginal interests in the territory to be decided while non-natives have acquired title to much of this land, and while its resources have been exploited by others. The plaintiffs believe, passionately, that their claims are just.

I have heard much at this trial about beliefs, feelings, and justice. I must again say, as I endeavoured to say during the trial, that Courts of law are frequently unable to respond to these subjective considerations. When plaintiffs bring legal proceedings, as these plaintiffs have, they must understand (as I believe they do), that our Courts are Courts of law which labour under disciplines which do not always permit judges to do what they might subjectively think (or feel) might be the right or just thing to do in a particular case. Nor can judges impose politically sensitive non-legal solutions on the parties. That is what Legislatures do, and judges should leave such matters to them.

Instead, cases must be decided on admissible evidence, according to law. The plaintiffs carry the burden of proving by a balance of probabilities not what they believe, although that is sometimes a relevant consideration, but rather facts which permit the application of the legal principles which they assert. The Court is not free to do whatever it wishes. Judges, like everyone else, must follow the law as they understand it.

What follows, therefore, is my best effort to determine whether the plaintiffs have proven, by a preponderance of admissible evidence, the facts which they have alleged in their pleadings, and whether such facts establish legal rights which are recognized by the law of this province.

I am sure that the plaintiffs understand that although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call "the white man's law," which has been changed considerably by a number of judgments delivered by the Supreme Court of Canada during the course of this trial. I am obliged to follow those judgements to the extent they apply to this case, and I must also accept the guidance and instruction they furnish.

I have no doubt that anything less than an award of complete ownership of and jurisdiction over the territory, along with substantial damages, will be a great disappointment to the plaintiffs. In my judgment the law does not permit such a decision in their favour although I have reached the conclusion they are entitled to succeed to a much lesser extent.

As will become apparent, the case is framed, as it had to be, for strict legal remedies. This makes it impossible finally to solve the real issues which exist between the plaintiffs and the governments. But this case is at least an important step in that direction.

The judgment which I must pronounce on legal issues does not preclude an important political and social responsibility that may only be discharged by the governments. I shall presume to mention this from time to time in these Reasons for Judgment.

I have no doubt that what I am about to say will not be the last word on this case and that this judgment will be appealed to the Court of Appeal and perhaps to the Supreme Court of Canada. With this in mind I shall endeavour, for the assistance of the parties and the appeal process, to describe as best I can the facts and reasons upon which I have reached the conclusions I am about to state.

The parties adduced such enormous quantities of evidence, introduced such a huge number of documents, and made so many complex arguments that I have sufficient information to fuel a Royal Commission. Although I assured counsel that was not my function, they apparently did not believe me.

As I am not a Royal Commission, and as I have no staff to assist me, it will not be possible to mention all of the evidence which took so long to adduce, or to analyze all of the exhibits and experts' reports which were admitted into evidence, or to describe and respond to all the arguments of counsel. In these circumstances I must do what a computer cannot do, and that is to summarize. In this respect I have been brutal. I am deeply conscious that the process of summarizing such a vast body of material requires me to omit much of what counsel and the parties may think is important.

With the assistance of counsel I have tried my very best to consider everything that is relevant, even if it is not mentioned in these Reasons for Judgment. As Counsel will be quick to notice, I have left out a great deal of the information which they went to such trouble to have admitted into evidence. As it turns out, I find it unnecessary to include a great deal of it in these Reasons for Judgment.

# PART 2

## THE CLAIM AND THE TERRITORY: AN OUTLINE

In due course I shall endeavour to describe the precise nature of this action and the parties. In this section I shall outline what the case is about.

This action is mainly about land, 22,000 square miles of it (58,000 square kilometres), which I shall call "the territory." "Territory" in this judgment has at least 2 meanings. In its usual sense, it means the geographic area lying within what is called the "external boundary." This is a vast area almost the size of New Brunswick.

On the next page is Map 1, which is a generalized map of the province showing the territory claimed in this action. On the following page is Map 2 showing an early version of the external boundary. This boundary has since been amended slightly as will later be explained. I have used this particular map because it best shows the important geographic features of the Territory. Map 2 is Ex. 1243 (Mr. Macaulay's Map), without any of its overlays except Ex. 1243D (Indian reserves) and I have added larger labelling of some prominent features.

The action is not brought as a typical collective or communal claim. Instead, the 51 plaintiffs, as described in Schedule 2, are all Gitksan or Wet'suwet'en "Hereditary Chiefs," who, individually or on behalf of their "Houses" or its members, claim one or more separate specific portions of the territory. Some of these specific areas are as large as a thousand square miles or more and some are as small as a mountain top. Each separate territory lies within what are called "internal boundaries." There are 133 of these individual territories. The sum of the areas within the internal boundaries equals exactly the total area within the external boundary.

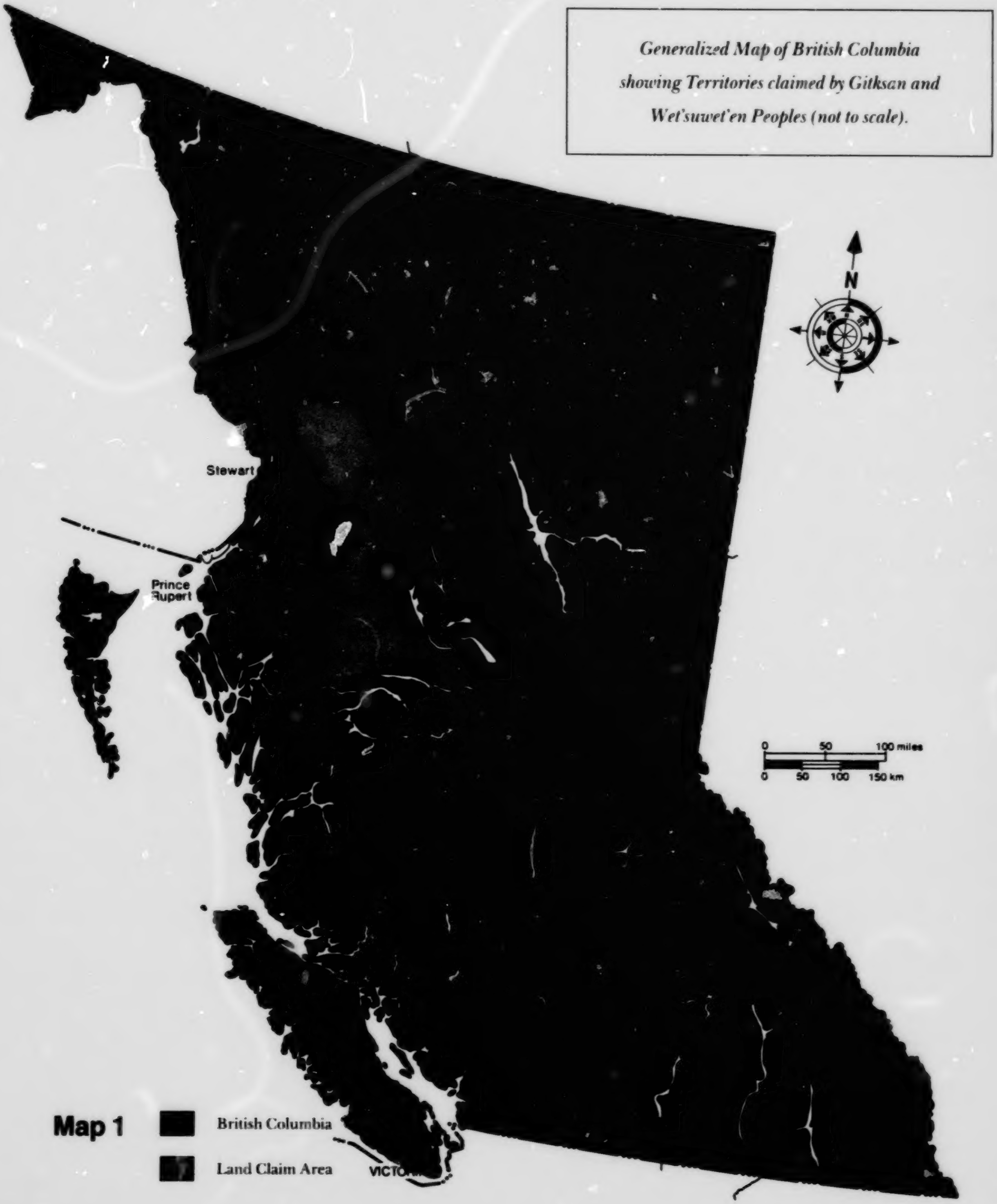
All the Gitksan Houses are divided into 4 clans which seem to originate, or at least congregate, in different villages in the territory. The Wet'suwet'en Houses are also divided into 4 clans. There is no Head Chief of a clan but there is an order of precedence or seniority amongst the Hereditary Chiefs of the Houses of each clan in each village.

No claim is advanced in this action on behalf of the clans. The plaintiffs' position is that the Chiefs, Houses, or members of Houses own the individual territories.

Following Maps 1 and 2 are separate maps (Maps 3 and 4) showing the final individual Gitksan and Wet'suwet'en territories. These are down-sized reproductions of Exs. 646-9A and 9B.

I shall be referring throughout this judgment to both the territory within the external boundary, and to individual territories within the internal boundaries.

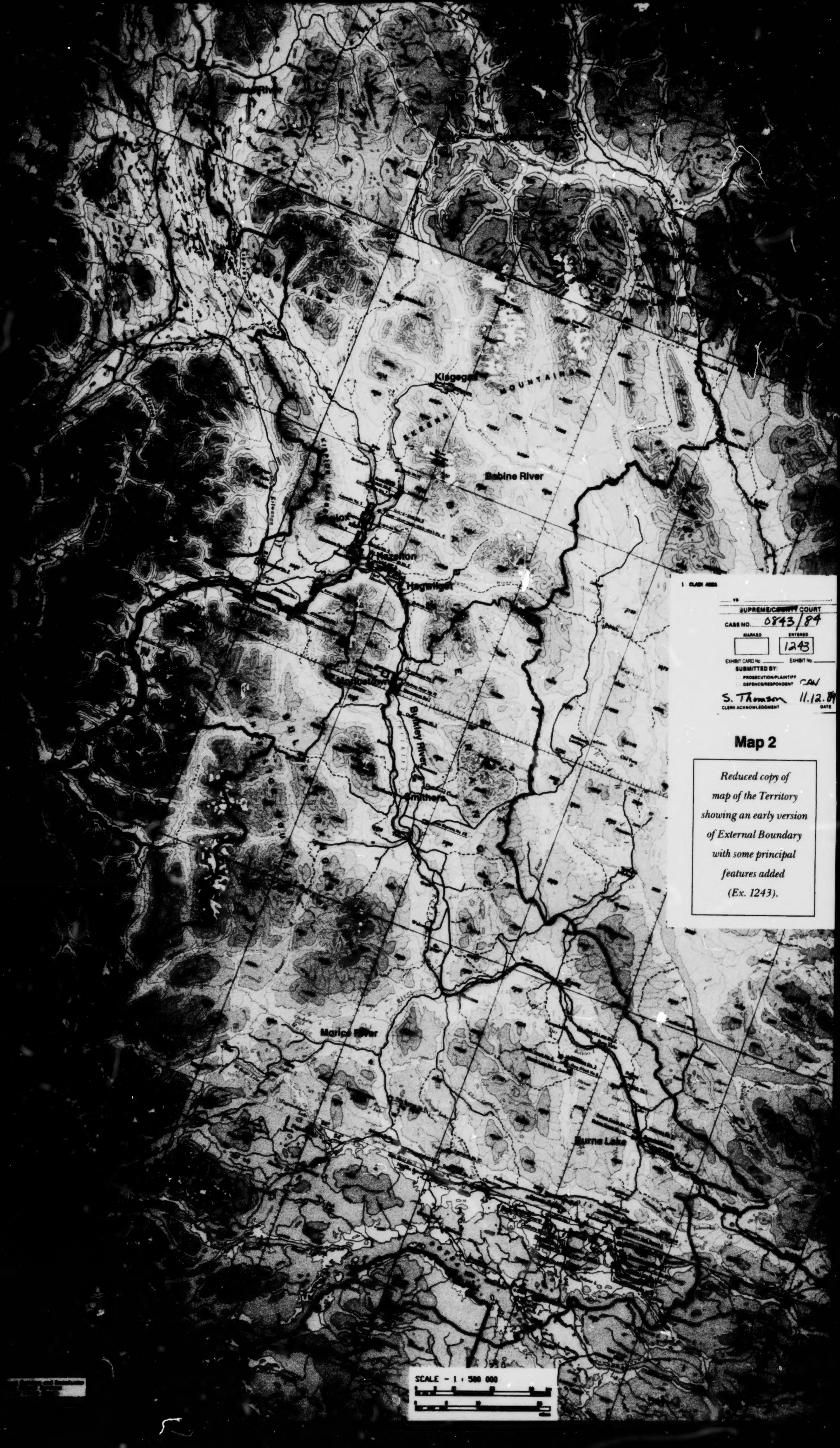
The Gitksan are a Tshimshanic-speaking aboriginal people who claim generally the watersheds of the north and central Skeena, Nass and Babine Rivers and their tributaries



*Generalized Map of British Columbia showing Territories claimed by Gitksan and Wet'suwet'en Peoples (not to scale).*

**Map 1**

N
Stewart
Prince Rupert
VICTO
0 50 100 miles
0 50 100 150 km
■ British Columbia
▨ Land Claim Area


Kisgegas
MOUNTAINS
Babine River
Hazelton
Hagwilget
Bulkley River
Smithers
Morice River
Burns Lake
Kitwanga
SCALE - 1 : 500 000

1 [illegible]

vs

SUPREME/~~COUNTY~~ COURT

CASE NO. 0843/84

| MARKED | ENTERED |
|---|---|
|  | 1243 |

EXHIBIT CARD No. ______ EXHIBIT No. ______

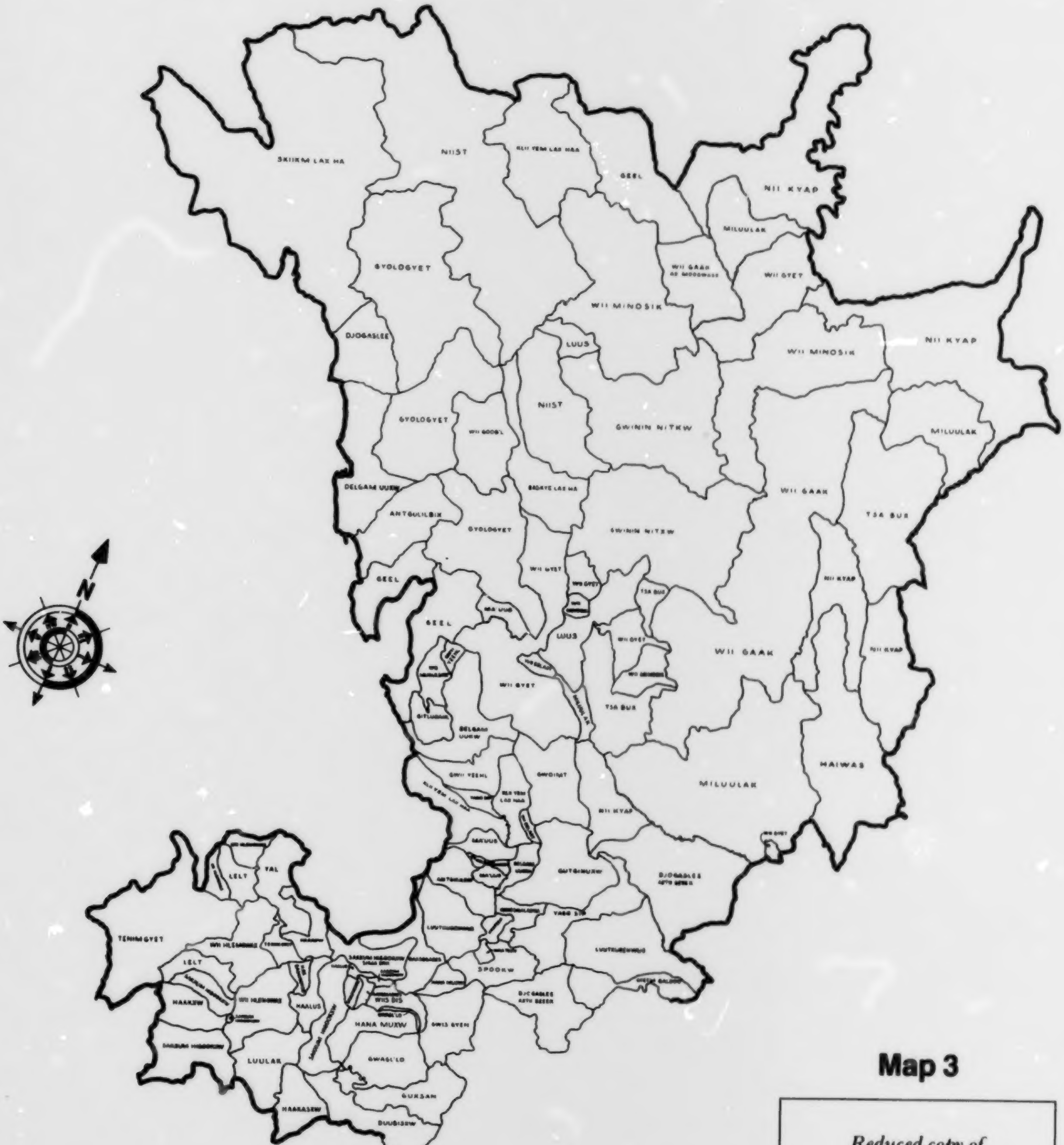
SUBMITTED BY:

☐ PROSECUTION/PLAINTIFF
☐ DEFENCE/RESPONDENT CAN

S. Thomson 11.12.89
CLERK ACKNOWLEDGMENT DATE

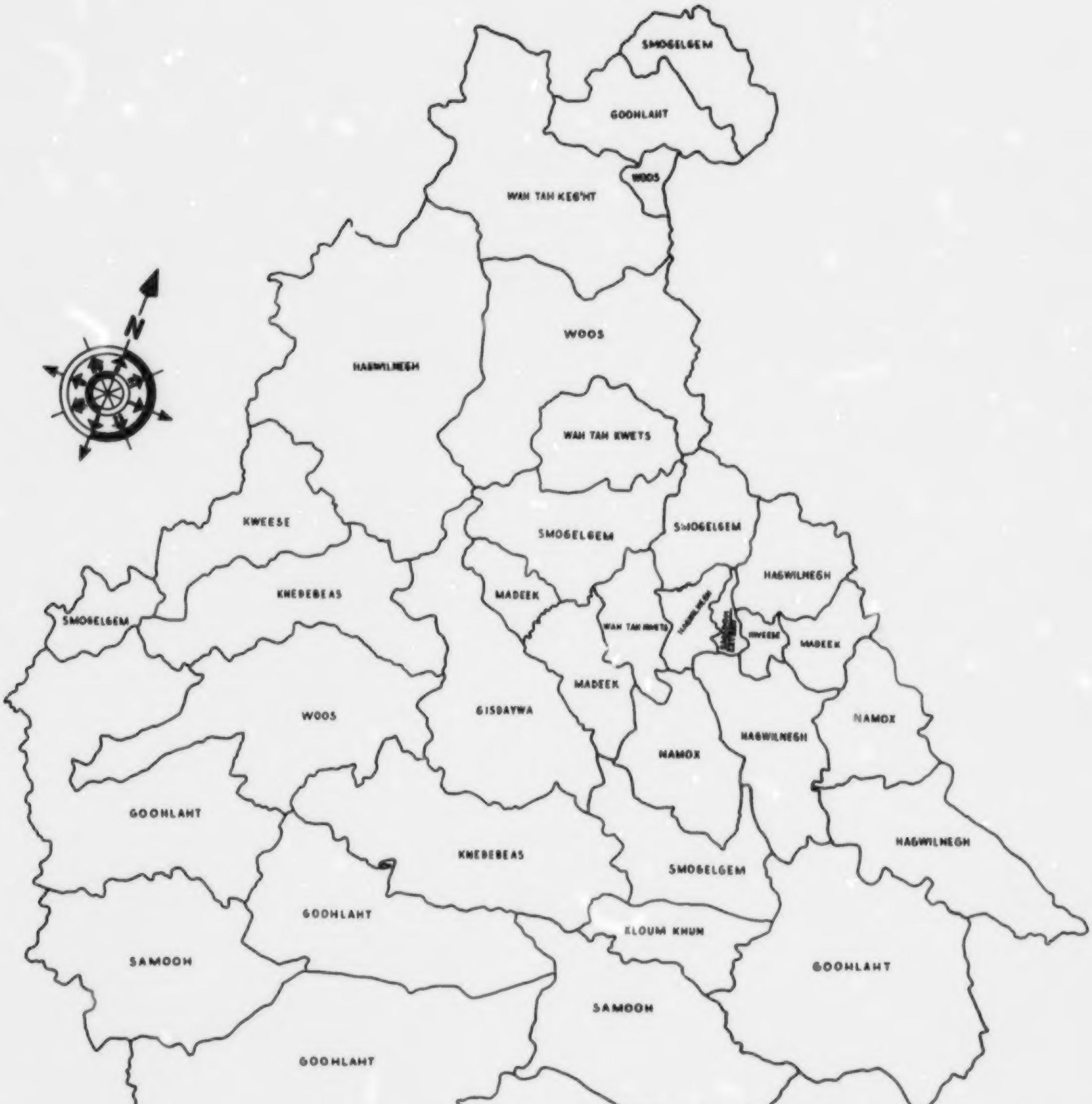
## Map 2

*Reduced copy of*
*map of the Territory*
*showing an early version*
*of External Boundary*
*with some principal*
*features added*
*(Ex. 1243).*


SKIIKM LAX HA
NIIST
GEEL
NII KYAP
MILUULAK
WII GAAK
WII GYET
GYOLOGYET
WII MINOSIK
DJOGASLEE
LUUS
NII KYAP
WII MINOSIK
NIIST
GWININ NITKW
GYOLOGYET
MILUULAK
DELGAM UUKW
ANTGULILBIX
GYOLOGYET
GWININ NITXW
WII GAAK
TSA BUX
GEEL
WII GYET
NII KYAP
GEEL
LUUS
WII GAAK
TSA BUX
WII GYET
DELGAM UUKW
HAIWAS
MILUULAK
GWOIMT
WII KYAP
GUTGINUXW
DJOGASLEE
YAL
LELT
TENIMGYET
LELT
SPOOKW
HAAXSW
HAALUS
WII DIS
HANA MUXW
GWIS GYEN
LUULAK
GWAGL'LO
GUXSAN
HAAKASXW
DUUBISXW
N

## Map 3

*Reduced copy of Overlay Map (Ex. 646-9A) showing Gitksan Internal Boundaries.*


N
SMOGELGEM
GOOHLAHT
WOOS
WAH TAH KEG'HT
WOOS
HAGWILNEGH
WAH TAH KWETS
KWEESE
SMOGELGEM
SMOGELGEM
SMOGELGEM
KNEDEBEAS
MADEEK
WAH TAH KWETS
HAGWILNEGH
HAGWILNEGH
KWEESE
MADEEK
WOOS
GISDAYWA
MADEEK
NAMOX
NAMOX
HAGWILNEGH
HAGWILNEGH
GOOHLAHT
KNEDEBEAS
SMOGELGEM
GOOHLAHT
KLOUM KHUN
SAMOOH
GOOHLAHT
SAMOOH
GOOHLAHT

**Map 4**

*Reduced copy of Overlay Map (Ex. 646-9B) showing Wet'suwet'en Internal Boundaries.*

within the territory. They number 4,000 to 5,000 persons, most of whom now live in the territory, mainly in villages alongside the Skeena River.

The plaintiffs in this action do not represent all of the Gitksan people because the 12 chiefs of the Kitwancool Houses of the Gitksan people have expressly declined to join in this action. I understand that these chiefs, described in the Statement of Claim as the "Kitwancool Chiefs," have advanced their own claim for areas allegedly owned by them or their Houses in the drainage areas of the Cranberry and Nass Rivers between areas claimed by the Nishga and those claimed by the plaintiffs.

The Wet'suwet'en are an Athabaskan-speaking aboriginal people who claim areas mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako River systems and their tributaries immediately east and south of the Gitksan. They number about 1,500 to 2,000 persons. Most of the Wet'suwet'en live in the territory, mainly in two villages alongside the Bulkley River.

There are some areas of dispute between the plaintiffs and other aboriginal peoples and although overlaps will later be discussed, it is not necessary in this case to pronounce upon the disputes between the plaintiffs and these other peoples.

The Gitksan and Wet'suwet'en peoples allege that they and their ancestors or predecessors have, from time immemorial, and well before the arrival of European influences or settlement, (sometimes called "contact") lived in, owned, controlled, possessed, and exercised jurisdiction over the territory. They further allege that they and their ancestors or predecessors, never having surrendered the territory by conquest or treaty, still enjoy aboriginal ownership of and the legal right to govern the territory according to their aboriginal laws which they claim are "paramount" to the law of British Columbia.

The plaintiffs, in what I understand they regard as a matter of grace on their part, do not seek to recover pre-Writ (1984) privately owned (fee simple) lands within the territory. Instead, they claim compensation from the province for the value of whatever territorial interests have been transferred to other ownership. They claim the right to terminate all less than fee simple legal interests in the territory, such as logging, mining and other leases or licenses.

The plaintiffs also claim damages from the province for the value of all resources removed from the territory since 1858 (when the colony of British Columbia was established), as well as damages for any harm to, or resources removed from, the territory by or under the authority of the Crown since that date. By agreement between counsel, the amount of damages to which the plaintiffs are entitled, if any, has been severed from the rest of the case, and was not dealt with at trial.

Many chiefs claim more than one territory and in some cases they also advance claims to specific territories for other Houses. For example, Earl Muldoe, the first named plaintiff, Delgamuukw, claims 2 territories for himself or for his House or members of his House of Delgamuukw, and he also claims other specific territories for the chiefs, Houses or members of the 2 Houses of Haaxw and Hage. This situation is common with many chiefs. As I have mentioned, 51 plaintiff chiefs are claiming 133 separate territories.

There are a small number of Houses which do not claim any territory, although those Houses, along with many others, claim fishing sites along one or more of the major rivers within a territory claimed by another chief. There seems to be no conflict between the plaintiffs on this issue. Actually, most fishing sites, though not all of them, are within Indian Reserves, and are not in dispute.

Except for a declaration that fishing in their territories or at their fishing sites is an aboriginal right, the plaintiffs advance no discrete land claim to fishing sites in this case. Instead, the plaintiffs claim ownership of the beds and banks of the rivers and lakes within their territories which is said to also carry the ownership of the fishery. In **Sparrow v. the Queen,** [1990] 46 B.C.L.R. (2nd) 1. (S.C.C.), which will be discussed later, the Supreme Court of Canada deals extensively with aboriginal fishing rights.

The total territory is a vast, almost empty area except in the Highway 16-C.N.R. corridor where most of the plaintiffs' villages are located. This corridor follows the course of much of the Bulkley and part of the Skeena Rivers from south-east to north-west diagonally through the south half of the territory. The territory measures about 275 miles in a north-south direction, centred more or less upon the Hazelton-Smithers area, and it is hour-glass shaped with a "Skeena bulge" in its west-central area. The territory probably averages 100 miles in width (east-west), although it is much wider in the extreme north and south than in the centre.

The most westerly edge of the territory is about 15 miles east of Terrace. It extends north almost to the northern headwaters of the Skeena, south of Ootsa Lake, and east almost to Babine Lake. The territory includes all of the present Gitksan villages of Kitwangak, Kitseguecla, Gitenmaax (Hazelton), Glen Vowell, and Kispiox, as well as the Wet'suwet'en villages of Hagwilget and Moricetown. It also includes the non-Indian locations of New Hazelton, Smithers, Houston and Burns Lake which are populated mainly by "Euro-Canadians" or other non-aboriginal persons.

To the north of the Bulkley-Skeena corridor the territory includes much of the watersheds of the Upper Nass, Middle and Upper Skeena and Babine Rivers, and Bear Lake, but not Babine Lake. Generally speaking, the plaintiffs say this is Gitksan country.

To the south of the corridor the territory includes all of the lands to the height of land south of Ootsa lake, including Morice Lake and most of Francois Lake. Generally speaking the plaintiffs say this is Wet'suwet'en country.

In addition to about 5,000 to 7,000 Gitksan and Wet'suwet'en persons, there are upwards of 30,000 others (mostly of European extraction), who are living within the territory.

The territory is a rich agricultural area, (particularly the Bulkley and lower Kispiox River valleys), and there are vast forestry resources throughout much of the territory. Equally important are the salmon and other fisheries of the Bulkley, Nass, Skeena and Babine Rivers. Most of the invaluable and irreplaceable Skeena salmon stock pass through the territory by way of the Skeena and Babine Rivers to their destiny in the spawning grounds of Babine Lake.

One of the most encouraging things I heard at this trial, of which there were very few, is that salmon stocks are at or approaching historic high levels, presumably because of the enhancement efforts undertaken at the Babine Lake salmon spawning grounds such as the Fulton River and Pinkut Creek hatcheries. On the other hand, the Wet'suwet'en allege that their natural fishing advantages at Hagwilget and Moricetown Canyons have been ruined or reduced by Federal Government endeavours (rock removal and fish ladders respectively), which they have much complained about. These issues are not raised by the pleadings and as I have not heard the other side, I shall not express any opinion on them.

While none of the wildlife evidence is unequivocal, I understood Dr. Ray to say the early historic records indicate that "game was never really plentiful" in the territory and that fishing was the mainstay of the economy. He also said that the exploitation of animals was pretty minimal "in terms of food," and that trader Brown (of the Hudson's Bay

Company), reported in the 1820's that the Atnah's (any non-Carrier) regarded beaver as unclean. Also, according to Dr. Hatler, moose and deer came into the territory relatively recently, replacing caribou which, in response to a warming trend which commenced about 1850, moved away from the territory into other areas which they found more hospitable.

I understand that wildlife generally prefer open skies to forest canopies. Dr. Hatler said:

> "Fires and clearing associated with early European settlement almost certainly enhanced habitats for the forest species, particularly moose, beaver and black bear."

He also said that, of the nine species mapped, six have maintained their general abundance and range since 1860. I do not suggest that clear cut logging has been an ecological advantage to the territory. That is for other disciplines to ponder and to weigh against economics. Aesthetically, Dr. Hatler's description of "moonscape" is appropriate. I was encouraged to notice on my travels through the territory that areas logged as recently as 3 to 6 years ago are starting to show signs of regeneration.

Although game animals may not be as plentiful in the transportation corridor as they were at the time of European contact, or before the railway was built, I am not persuaded there is either a shortage or an excessive abundance of wildlife in the territory.

There are some mining resources in the territory, including the Equity Silver Mine which is reported to have limited remaining ore reserves, but mining is not currently significant when compared with agriculture and forestry which are the economic mainstays of the region. There are, unquestionably, immense forestry reserves throughout the territory which are of great economic value.

The most striking thing that one notices in the territory away from the Skeena-Bulkley corridor is its emptiness. I generally accept the evidence of witnesses such as Dr. Steciw, Mrs. Peden and others that very few Indians are to be seen anywhere except in the large river corridors. As I have mentioned, the territory is, indeed, a vast emptiness.

This is largely because, over the last several decades, the Indians of the region have gradually migrated into the villages of the transportation corridor. This has been driven by economics and an understandable wish on the part of the Indians for a better standard of living. The plaintiffs' first witness, Mrs. MacKenzie, said her people originally lived in the far northern village of Gitangasx but moved first to Kuldo and finally to Kispiox. She does not know when these migrations occurred and suggested they may have been hundreds or thousands of years ago. I believe they occurred much more recently.

No one lives today at the site of the former important village of Kisgegas (near the confluence of the Babine and Skeena Rivers), except for the two McLean brothers who are said to live part-time in a dwelling which I saw on the south side of the Babine River across from the old village. At the present time at Kisgegas there are only deserted and crumbling dwellings and an interesting, abandoned church. I understand there have been few residents there since the 1930's or 1940's. Mr. Brodie reported 300 residents in 1891, but only 65 in 1929 and 2 (possibly the McLeans), in the spring of 1985. The evidence suggests that there are temporary residents there during the annual summer salmon run.

Similarly, no one lives at the former Gitksan village sites of Gitanka'at, Ksun, Kuldoe, Old Kuldoe, and Gitangasx. Many Wet'suwet'en locations such as Pack Lake and Sam Gosley Lake are now deserted. Without question, the Indians have largely moved out of the isolated locations and into the villages in the transportation corridor.

This is not to say that some Indians do not return to these areas for hunting and trapping about which I shall have more to say later. The trapping industry fell into serious decline in the early 1950's but although prices have improved there seems to be little interest in pursuing that vocation on the part of most Indians, particularly the young ones.

It is common, when one thinks of Indian land claims, to think of Indians living off the land in pristine wilderness. Such would not be an accurate representation of the present life-style of the great majority of the Gitksan and Wet'suwet'en people who, while possibly maintaining minimal contact with individual territories, have largely moved into the villages. Many of the few who still trap are usually able to drive to their traplines, and return home each night.

Similarly, it would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs, that aboriginal life in the territory was, at best, "nasty, brutish and short."

# PART 3

## DEFINITIONS

In order to describe the claims which the plaintiffs are advancing in this action it will be convenient to define some of the legal terms which will be used in this judgment. I shall not attempt in this part of my judgment to furnish exhaustive definitions. I wish to emphasize that there are important distinctions which must be kept in mind.

### 1. Ownership

In their pleadings and submissions the plaintiffs admit that the underlying title to the soil of the territory is in the Crown in right of the province of British Columbia. This is sometimes called the allodial, underlying or radical title of the Crown. Subject only to this underlying title, the plaintiff chiefs say that by aboriginal right they or their Houses or members own and are absolutely entitled to occupy and possess the individual territories they claim. They say that their aboriginal right is for all purposes equivalent to ownership in fee simple. However, they admit that they cannot alienate their lands by sale, transfer, mortgage or other disposition except to Canada by treaty concluded at a public assembly in accordance with the requirements of the **Royal Proclamation, 1763,** which they say applies to British Columbia, or at least re-states the law.

I do not understand the plaintiffs to allege or claim any "people-wide" collective or communal ownership interest in any of the Gitksan or Wet'suwet'en territories, that is to say each chief claims ownership of specific territory or territories, and none of them claim any interest in any other territory.

### 2. Aboriginal Rights

In this judgment I propose to use the term "aboriginal rights" to describe rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them. These are the kinds of "usufructuary rights" mentioned in **St. Catherines Milling and Lumber Co. Ltd v. Attorney General of Ontario (1886) 13 S.C.R. 577** and which the plaintiffs claimed in **Calder v. Attorney General of British Columbia,** [1973] S.C.R. 313. These kinds of rights were awarded, in part, in **Hamlet of Baker Lake v. Minister of Indian Affairs,** [1980] 1 F.C. 518 (F.C.C.).

There is no specific claim in the Statement of Claim in this action for a declaration respecting such rights although "aboriginal rights" are mentioned. Early in the trial, plaintiffs' counsel said that the plaintiffs' claim was for ownership and jurisdiction — "all or nothing" as I believe it was then described but that position was later modified. This question of pleadings will be more fully discussed later in these Reasons for Judgment.

## 3. Indian Title

Many authorities refer to "Indian title," which appears frequently, for example, in the judgment of Hall J. in **Calder.** In that case the claim was only for a declaration that "aboriginal title, otherwise known as the Indian title of the plaintiffs . . . has never been extinguished." There was in that case no claim for ownership, jurisdiction or damages so there was no need in that case to use these terms precisely. Indian title is commonly used interchangeably with aboriginal rights as I have attempted to define them.

## 4. Jurisdiction

Jurisdiction has two important dimensions in the plaintiffs' claim.

### (a) Jurisdiction over land

The plaintiffs say that their ownership interest in the territory entitles them, or their Houses or members, at their option, to govern the territory free of provincial control in all matters where their aboriginal laws conflict with the general law. I understand the position taken by their counsel to be that, upon a judgment granting them ownership and jurisdiction over these lands, they, and not the government of British Columbia, may control all land-related activities in the territory.

### (b) Jurisdiction over people

As an examination of the transcript of my various exchanges with counsel during argument will disclose, I have encountered some difficulty understanding this claim. I shall discuss it in greater detail later but I now understand this claim relates not just to land but rather to partial self-government limited to those areas where traditional Gitksan or Wet'suwet'en "laws" conflict with laws enacted by British Columbia pursuant to s. 92 of the Constitution of Canada.

I do not understand the plaintiffs are seeking a judgment striking down or declaring inoperative against them any present British Columbia enactment or regulation. Instead, they wish the court to make a declaration that some agency of the Gitksan and Wet'suwet'en people, presumably their chiefs or some other aboriginal body (although its identity was not made clear), are entitled to govern Gitksan and Wet'suwet'en people in the territory.

Then, their argument goes, they may decide which of the general laws of the province, such as laws relating to education, health, family matters and land use etc., conflict with their own laws.

They wish such a declaration so that, if they decide not to obey any general laws of the province and proceedings are brought to force compliance, they may plead their own laws and the declaration of this court in their defence.

The plaintiffs argue that this right to jurisdiction over people is confined to Gitksan and Wet'suwet'en persons within the territory, and they say this is a right conferred upon them by the law. It appears, however, that the plaintiffs intend to require non-Gitksan or Wet'suwet'en persons within the territory to comply with aboriginal law relating to land.

## 5. Aboriginal Interest

This is a term I shall use in a neutral, descriptive sense to describe any unspecified aboriginal right. I do not believe there is any aboriginal interest additional or different from the other "interests" I have defined. It is merely a shorthand term of convenience which I shall use when precision is not required.

# PART 4

## AN HISTORICAL OVERVIEW

It is not possible to discuss this case except in an historical context. What follows, therefore, is a brief summary of some of the history which emerges from the evidence. In later parts of this judgment I have included greater detail about some of these matters. The following is intended only as I have described it — an overview.

There are many relevant, interfluent histories. They include the origins of our native peoples, early European discovery, exploration, settlement and development on the east and west coasts of this continent; inland explorations, particularly the western spread of the Hudson's Bay and North-West Companies' activities originating from Hudson's Bay and Montreal respectively; and the early political history of the British and American colonies, Canada, and this province before and within the Canadian Confederation, as well as settlement within the territory.

I cannot hope to do justice to these rich and fascinating histories. Some of them are remarkably well documented. Others, unfortunately, exist only in the memory of plaintiffs, and some of them have received some scholarly attention. I intend no disrespect to the fascinating work of Morice, Barbeau, Beynon, Duff and others, but much remains to be done in order to prove or disprove the authenticity of their conclusions. In addition, the territory has only been scratched archaeologically, and I suspect much remains to be found.

I can only mention the high points of all these less precise classes of history and I must leave it to the social scientists who are just beginning their journeys of discovery into the vast and largely uncharted **terra incognita** of the unwritten histories. I wish I could know what they will discover.

In this overview I must paint with the broadest possible brush, particularly in the early parts of these marvellous histories and I shall attempt to treat them as just one interrelated story. After this overview I shall return to deal with the separate legal issues as lawyers and judges must, that is to examine the details.

I shall attempt to follow a general chronological format although there will undoubtedly be huge gaps and omissions. It will be convenient to insert a few headings into the text so as to introduce a modicum of order which is so much to be desired.

### 1. The Pre-Historic Period

The evidence does not disclose the beginnings of the Gitksan and Wet'suwet'en people. Many of them believe God gave this land to them at the beginning of time. While I have every respect for their beliefs, there is no evidence to support such a theory and much good reason to doubt it.

It is known that the territory was largely if not entirely covered by ice during the last great Ice Age which ended about 10,000 years ago. The ice extended southward into the state of Washington. During that period there were, apparently, one or more ice-free refugia in what is now part of the southern Yukon.

Most scientists believe the ancestors of our aboriginal people migrated to this continent from Asia, probably after, but possibly before, the last great Ice Age. In the latter alternative scientists believe that such people may have found refuge in a northern refugia, or migrated south ahead of the advancing ice and then returned to the north after the ice retreated. Dr. Daly said the origin of these people was Asiatic in "early pre-history." This suggests post-glacial migration, but that is not a certainty.

The different languages of the Gitksan and Wet'suwet'en, as well as their lingual affiliation with other speaker groups of the same or similar languages, strongly suggest either a different origin, or a very early separation.

The Gitksan speak a variation of the Tsimshian language which is shared, with minor differences, with the coastal and south Tsimshian and with the Nishga of the Nass River valley. The Wet'suwet'en, on the other hand, speak an Athabaskan language which they share, also with differences recognized by specialists, with many Carrier people throughout North America. These include the Beaver, Alchako-Chilkotin, and many more distant Athabaskan-speaking groups who have spread southwards into what is now the United States, such as the Hupa and Tolowa of California and the Navaho of the American south-west. There is practically no difference between the language of the Wet'suwet'en and that of their immediate neighbour, the Babine people. The Babine dialect is itself distinct from some Carrier languages.

Dr. Kari, who has studied these questions with distinction, suggests a probable Wet'suwet'en separation from the source Athabaskans about 2500 years ago but this is, admittedly, not a precise opinion.

It is my conclusion, doing the best I can without the assistance of very much evidence, that the plaintiffs' ancestors, both Gitksan and Wet'suwet'en, migrated from Asia, probably through Alaska, but not necessarily across the Bering Straits, after the last Ice Age, and spread south and west into the areas which they found liveable. As we shall see from the evidence, however, there has been considerable mobility over the centuries and it is unlikely, or at least not proven, that any or all of the plaintiff groups have occupied the territory for all of the time since these post-glacial migrations. There is some reason to believe, for example, that the Wet'suwet'en, may have migrated into the areas they claim from east of the Rocky Mountains which could have occurred before or since the Ice Age. Another theory is that some of them sprung from the refugia after the ice retreated, to follow the caribou until they discovered salmon in the great rivers and adopted the culture of other groups which preceded them from the refugia or otherwise.

Other possibilities are that they migrated to the territory from the south, or that they came from the coast, or possibly a combination of all the above. The categories of other possibilities are not closed. For the purpose of this judgment it really does not matter where the plaintiffs' earlier ancestors came from.

The evidence of the archaeologist Sylvia Albright, and many of the authors upon whom she relied or mentioned, such as K. M. Ames and Dr. George MacDonald, establish that there was some form of human habitation at some locations in the territory particularly at Hagwilget and Moricetown and at surrounding areas such as at Prince Rupert harbour and Kitsilas Canyon from 6,000 to 3,500 years ago. These studies confirm human presence at these locations at various dates throughout the Pre-historic Period, but there were probably discontinuances.

While I have considerable reservations about some of the archaeological evidence, there is no reason not to accept the conclusions of Ames that there was intense occupation of the Hagwilget Canyon site, near present day Hazelton, prior to about 4,000 to 3,500 B.P. ("Before Present;" "Present" in archaeological terminology equals 1950 when carbon dating became possible).

After that, Dr. MacDonald believes occupation was light and sporadic, probably limited to fishing, which continued until 1820 when the locality was given by the Gitksan to the Carrier (as the Wet'suwet'en were still called when Ames wrote in 1971), because a rock slide blocked the Bulkley River and deprived the natives at Moricetown of any source of salmon. This site has remained ever since as a locality occupied by the "Hagwilget Carrier," as Dr. Ames described them.

Ms. Albright has constructed a similar scenario for other sites, inside and outside the claim area, which are found at Ex. 844, Table 5. There are some parts of Ms. Albright's evidence in which I do not have confidence, as she seemed to base some of her archaeological opinions on flimsy evidence. There is, however, no reason to doubt that there was some human habitation during some pre-historic periods at some of the sites she described.

According to Gitksan belief, based almost entirely upon oral histories related to and collected by anthropologists such as Barbeau, Beynon and Duff, the Gitksan people lived in some form of social organization long before contact with European influences. They believe there were always settlements at all present village sites as well as at Gitangasx on the Upper Skeena north and west of Bear Lake at Kisgegas on the Babine River near its confluence with the Skeena, at Temlaxam (their largest and most important ancestral village) on the north or west side of the forks of the Skeena and Bulkley Rivers, and at Gitanka'at downstream on the Skeena from Temlaxam, between Lorne and Fidler Creeks, approximately opposite the fabulous Seven Sisters Mountains.

Gitksan oral histories suggest that there were dispersals to and from these ancestral villages to other locations within the territory at some pre-historic time, possibly caused or connected with some natural or supernatural phenomena. Their belief is strong that their ancestors have always lived in the territory.

There does not seem to be nearly as much oral history about the origins of the Wet'suwet'en people. I recall mention of only one ancestral village, Dizkle, on the Bulkley South of Hagwilget, and their history really begins with the observations of the Hudson's Bay traders who came into the territory in the 1820's. No trace of Dizkle has ever been located, and there is no objective evidence of pre-historic Wet'suwet'en occupation south of Moricetown.

I would not wish it thought that by mentioning these beliefs of the plaintiffs that I am making any specific findings. There is much dispute about these matters, as there is about much of the history I shall be mentioning in this overview. Generally, my findings will be found not in this part of my judgment, but later.

## 2. Early North American Exploration

It will not be necessary in this Judgment to pronounce on the fascinating questions of Viking or other Norse-type explorations on the north and east coasts of North America. For my purposes it is sufficient to start with European expansion into this continent after the voyages of various navigators such as Columbus (1492), and Cabot, who according to Chief Justice Marshall, discovered North America in 1498 when he sailed as far South as Virginia, and from whose discoveries "... The English trace their title [to North

America]": **Johnson v. M'Intosh,** (1823) 8 Wheaton, 543 (U.S.S.C.) and, of course, the noted French navigator-explorers such as Cartier, Champlain and many others.

Following these and many other heroic efforts there were gradual increases of populations in the Eastern Seaboard of the United States, in the Maritimes, in Quebec, and in the Floridas, with the English predominating in the former two areas, the French in Quebec, and the Spanish in the south.

Early in this continuum other great explorations were under way, principally from Europe west and southward. Magellan's expedition circumnavigated the globe in 1519-22, and Drake sailed into the Pacific landing at Drakes's Bay near the present San Francisco in 1579, and then northwards but it is doubtful if he landed on, or even saw the coastline of British Columbia. With respect, my research differs from that of Hall J. in **Calder,** (at p. 400) where he said Drake sailed as far north as Cook did two centuries later. Cook, was forced far out to sea by a fierce gale after leaving Nootka, and;

> "in the course of a long slant northwestward [they] only saw the coast at a few points before sighting (on May 4th) a snow covered mountain which Cook identified with Bering's Mount St. Elias, (roughly 1,000 miles northwest from his anchorage at Nootka. (R.T. Gould, **Captain Cook,** (1978))

I have not been able to locate Vol III of **Hakluyt's Voyages,** but its sub-title refers to voyages "to all parts of the new found world of America" and "... to California, Noua Albion, and more northerly as farre as 43 degrees ...," including the voyages of Sir Francis Drake around the world. I also find, in an editors footnote to Hakluyt's **Divers Voyages,** (1582), J.W. Jones ed.:

> "Drake sailed as high as 40 [degrees] of north latitude, with the bold design of returning home by a north-east passage, and still found an open sea before him; at this point, however, the sufferings of his men from cold obliged him to turn southwards again."

I am unable to explain Hall J's reference, with respect to Drake, to lifeless trees, and natives living in houses covered with earth. The snow covered ridges he mentions could be any of the great volcanic mountains of the west coast of the United States, such as Mounts Shasta, St. Helens, Hood, Rainier or even Baker.

In the 1580's or 90's, De Fuca, a Greek explorer in the service of Spain, visited the same California coast as Drake. We will never know whether he actually discovered a "widening strait at 47 degrees 48"," which is approximately the location of the great strait that now bears his name. That is what Lok reported but Dr. Farley and other historians believe such account is fictitious, although the geography is approximately correct.

Meanwhile, back on the east coast Champlain in 1615 reached Lake Huron, and was surprised to find that it was a fresh water lake. Russian Cossacks and fur hunters reached their side of the Pacific in 1639 and a trading expedition of 4 vessels out of 7 got lost and reached the Siberian Gulf of Anadyr, opposite the mouth of the Yukon River in 1648.

While there was progressive movement westwards in North America, there was little activity in Siberia for the rest of the 17th century as the principal Russian thrust was southwards into China. Of greater importance, however was the incorporation by Royal Charter of the Hudson's Bay Company in 1670, and the establishment of the Forts on the west side of that bay which gave its traders and explorers a great mileage advantage over the French **coureurs de bois** heading out of Montreal for the trapping areas of the Canadian north.

In 1673 Marquette and Jolliet entered the Mississippi River by way of Green Bay (Wisconsin) and travelled down its course nearly as far south as the Arkansas River when, fearing Spanish interference, they turned homeward by way of the Illinois River and then back to Lake Michigan. The source of the Mississippi, however, remained unknown for more than one hundred years.

In 1690 interest was revived in Siberia and Russian traders made their first visits to Kamchatka.

By the middle of the 1600's the French believed that somewhere in the west there was a divide where one or more rivers flowed westward to the Pacific. Their belief, however, was that there was a large inland sea, known as "Mer de l'Ouest" or "Western Sea" which in turn drained into the Sea of the South, or Pacific.

In 1670 Talon, the Intendant of New France instructed the Sieur de Saint Lusson to proceed to the upper Great Lakes to determine whether there was a route to the Sea, and to China. Saint-Lusson, in 1671, met with a number of Indians at Sault St. Marie, and proclaimed that he was taking possession of the upper lakes, "and of all other territories discovered or to be discovered." At this time Jesuits travelling with Saint-Lusson believed that it was no more than 300 leagues to the sea, and not more that 1500 leagues to the Orient. A league equals 3 miles.

Of closer interest were the explorations of Henry Kelsey, who, in the service of the Hudson's Bay Company travelled westward from York Factory, wintered at the Pas, and in 1690 was probably the first white person to see the Canadian prairies reaching, probably, the area around present-day Saskatoon. For unexplained reasons, few records are known to exist of Kelsey's travels and although he remained in the service of the Company for most of his life, his discoveries seem to have attracted little attention.

By 1700 there was little, if any, European influence in western North America. Even horses were unknown to the plains Indians until mid-century, or in the territory until the middle of the 1800's. The maps collected by Professor Farley and those produced on his cross examination disclose, generally, the state of European knowledge at various dates. While the eastern and southern parts of this continent were becoming understood, the source of the Mississippi, the location of the Rocky Mountains and the west coast north of California were all unknown. Most maps show north-west America, including the territory, as "Terra Incognita" or "These parts Entirely Unknown." This state of relative ignorance about this part of the world remained that way for almost another century.

This is not to say there was not some understanding in some quarters about this largely unexplored part of the world. The information known to those on the frontier, however, had not reached the map-makers of Europe nor had the historical record advanced the generally understood state of awareness beyond that shown on the maps. It should be remembered that Cook reached this coast only in 1778, 19 years after the capture of Quebec on the Plains of Abraham in 1759, and that the earliest recorded Russian sighting of the west coast of this continent (the volcano of Mount St. Elias in Alaska) by Bering's expedition was not until 1741.

### 3. The 1700's

In the 1730's and 40's, in the service of France, La Verendrye and his sons established posts north-west of Lake Superior at Rainy Lake and on Lake of the Woods and pushed further west into what is now southern Manitoba, and southwards into the drainage area of the Missouri River. In 1742, one of his sons is reported to have achieved sight of the Rockies, but Dr. Farley believes what he saw were more probably the Big Horn Mountains of Wyoming. In an undated memorandum contained within the La Verendrye papers in the National Archives of Canada one of the La Verendryes noted:

> "Upriver from the Brochets are the Gros Ventres, then the Grandes Oreilles who live at the height of land. After the latter come the Gens du Serpent, who are said to be much more numerous than all the other nations and are their enemies, then come the Noirs and after the Noirs, the Whites of the Sea."

It is likely this information was obtained from Indians. The Gens du Serpent were the Shoshoni or Snakes who lived in the present states of Wyoming, Montana and Idaho. The Blacks were probably the Blackfoot of the Missouri and Saskatchewan Rivers in present Montana and Alberta, and the Whites of the Sea may have been the Spanish of California.

Other French reports, such as those furnished by Bouganville, refer to a fort built 80 leagues further up the Paskoia (Saskatchewan River) at Fort des Prairies in 1757. Further, De Niverville may have established a short-lived "Fort Lajonquiere," (the most westward of French penetration into what is now Western Canada) in 1751 which has been variously located "at the foot of the Rockies," or near the location of Calgary, or possibly in what is now central Saskatchewan.

At this point, it is necessary to return to the East Coast where major events were underway.

The War of Spanish Succession was ended by the Treaty of Utrecht in 1713 by which France ceded Nova Scotia to Britain, and Rupert's Land was returned to the Hudson's Bay Company. The terms of the treaty, particularly the boundary between Rupert's Land and New France were never finalized. For the next generation there was an uneasy peace on the frontier between British and French settlements in North America, as well as continuing competition between Hudson's Bay traders who operated out of the Forts on that Bay, and the French who had a much longer overland route, generally out of Montreal via the Ottawa River, to the trapping grounds of the distant north and west.

For many reasons, not the least of which was concern about the safety of settlers, and the fear of war with France, both the British in London and the Governors in the Colonies were persuaded to negotiate with the Indians. Numerous treaties of peace and friendship were concluded partly with a view to insuring the assistance, or at least the neutrality, of the Six Nations which shared a common, westward-moving frontier with the settlers from the colonies.

These treaties or agreements are of fundamental importance to the understanding of the legal authorities which were so much discussed at trial. They furnish the background for the development of the law which applied to the eastern half of this continent, and indeed, one of the central issues in this case will be to determine whether that same law should be applied to British Columbia which, as will be seen, has a completely different history.

Next came the Seven Years War, and the capture of Quebec by General Wolfe in 1759, the surrender of Montreal in 1760 and the Peace of Paris in 1763. By this Treaty, France ceded to Britain all of her former possessions in New France including Quebec, all of the coast and interior of Louisiana west of the Mississippi, and East and West Florida. Britain in turn acknowledged France's claim to North America west of the Mississippi but excluding Rupert's Land whose southern boundary had never been settled but was often thought to be the 49th parallel.

The British were anxious to keep peace on the frontier, and for this and other mercantile reasons, Britain caused a Royal Proclamation to be issued in 1763. This Proclamation, amongst other things, established a huge hunting reserve for the Indians generally east of the Appalachian Mountains but excluding the existing colonies, the new colony of Quebec and Rupert's Land.

One of the interesting questions which I shall deal with shortly concerns the reach of this Proclamation. The plaintiffs say that even if the hunting reserve ended at the Mississippi, it squeezed north-westerly between the headwaters of that great river (Lake Itasca in the present State of Minnesota at 47°13'N; 95°13'W) and the undefined south border of Rupert's Land, and then fanned out across the Canadian prairies to the Pacific. The defendants say it never applied west of the Great Lakes, or more particularly in the present province of British Columbia. More about that later.

Following the Peace of Paris, the inexorable pressure of settlement continued to harass the Indian populations of North America. The American colonies continued to negotiate with the Indians and to enter into treaties with them. Quebec extended its boundaries west to the Mississippi south of Rupert's Land, and south into Ohio country in 1774. By the 1783 Treaty of Paris the American colonies had gained their independence, and the present boundary with the United States was established through the centre of the Great Lakes. Quebec was then divided into Upper and Lower Canada in 1791. During all of this period, settlers were moving west in a continuing process. I suspect activities "on the ground" were often quite different from the political intentions and pronouncements of the statesmen, usually to the disadvantage of the Indians.

At this point it is necessary to return to the territory.

## 4. The Proto-Historic Period

"Proto-historic" refers to the period before actual contact with Europeans, but after European influences began to impact upon an aboriginal people. From time to time in this judgment I shall abbreviate "European Influences" to "contact." It is not possible to speak with much confidence about the commencement of this period in the territory but some historical facts are known which at least permit informed estimates.

For the purposes of this case we can more or less ignore the explorations of Drake and de Fuca for it is not believed they reached our coast. Bering and Chirikov's expedition with several ships sailed across the north Pacific in 1740-41 and the latter sighted the volcanic activity of Mt. Elias in southern Alaska. Their ships landed near Sitka, and sighted natives at 54 degrees North latitude thus commencing (or continuing) Russian trading activities on the north Pacific coast. Russian presence on this coast may have come earlier but I recall no specific evidence of this.

Captain James Cook R.N., on his 3rd voyage of discovery, in search of a north-west passage, stopped at Nootka on Vancouver Island in 1778. Although he then sailed further north before returning to winter in Hawaii, and his vessel actually passed through the Bering Straits after Cook's death, it did not land on our north coast. We also know that at about the same time numerous Spanish explorers visited our coast, as did Captain Vancouver in 1793. Captain Vancouver and others such as Barclay actually charted much of our coastline by 1794.

Those voyages, particularly Vancouver's, put to rest forever the notion that there was a north-west Passage from sea to sea, and also disproved the notions based upon de Font's mythology that there was an Inland Sea. It is nevertheless, entirely possible that the Straits of Georgia and Johnson Straits had indeed been visited by some unknown navigator or explorer who mistook such waters for an Inland Sea.

That same year Alexander Mackenzie, in the service of the North West Company, reached tidewater near Bella Coola "from Canada, by land, the 22nd of July, 1793."

We also know that a cruel sea otter trade started in the north Pacific in the 1780's with British, American, Russian and possibly other nationals almost extinguishing the sea otter until this trade fell into a sharp decline because of over-hunting just after the turn of the century. This made it necessary for traders to find other kinds of furs, and the interior fur trade was their natural response. The fur trade, of course, brought large quantities of trade goods to the north coast some of which found a way into the interior. Duff comments on how quickly coastal trade arose, stating in **"The Impact of the White Man"** (1969, 2nd edition), that "within a very few years after 1785 the entire coast was glutted with trade goods".

By the early 1800's, Russian traders had established an outpost at Sitka, and the Tsimshian and Carriers had established trade networks with the Gitksan in the north and with the Bella Coola people in the south. The Gitksan became middlemen for the Tsimshian traders.

In 1805 Simon Fraser, also of the North West Company, established Fort McLeod, the first fort west of the Rockies, and also Fort St. James on Stuart Lake in 1806. He made his remarkable voyage to the sea on the river which bears his name from Fort George to Point Grey and back in just 76 days between May 22nd and Aug. 6th, 1806.

But none of these explorers were in direct (or perhaps any) contact with the Indian occupants of the territory. This seems to have been the situation until after the merger of the Hudson's Bay Company with the North West Company in 1821, at which time the Company was given a monopoly over all British North America except for the existing colonies (the Maritime provinces, Upper and Lower Canada). In the same year the Czar issued an Imperial Ukase asserting exclusive right of trade on the Pacific coast north of the 51st parallel.

In 1822, however, William Brown of the Hudson's Bay Company — one of our most useful historians — established Fort Kilmaurs on Babine Lake. He and other agents of the company made occasional journeys into parts of the territory. Brown himself visited some Babine River Villages in the 1820's. MacGillvray in 1833 was probably the first white person into the rest of the area. Peter Skene Ogden visited Hotset (Hagwilget or Moricetown) in 1836. Brown reports some minimal levels of social organization but the primitive condition of the natives described by early observers is not impressive.

Fort Connolly was established at Bear Lake in the territory in 1826, and the Hudson's Bay Company did not establish a post at Hazelton until 1866.

Thus it would seem that the time of direct contact in the territory was not earlier than the early 1820's which is a reasonable date to select as the end of the proto-historical period.

There is some conflict in the evidence about the start of this period. Dr. Robinson believes that it was as early as 100 years before actual contact, mainly because of trade goods filtering into the territory both from the east and south as well as from known and unknown Russian (and possibly other) Asiatic travellers or traders who may have visited our coast.

Other witnesses put the start of the proto-historical period later than Dr. Robinson, possibly about the time of the start of the sea otter trade in the last few years of the 18th century or early 19th century.

## 5. The Historic Period

The difference between the pre-historic, proto- and historic periods is relevant to the question of determining what are aboriginal as opposed to non-aboriginal practices. I shall discuss this later.

It seems indisputable that the historic period began in the territory with the establishment of Fort Kilmaurs on Babine Lake by trader Brown in 1822. Although this is outside the territory, it was close enough that his Journal provides the first direct evidence of what was happening in the area. He estimated the native population at around 1,000 but Dr. Ray thinks it must have been closer to 7,000.

In 1822 Brown learned that the Atna (Gitksan, or any non-Carrier) had barricaded the Babine River, and that the Gitksan were apparently trading and fighting with the Sekani (Rocky Mountain Indians) in the north-east.

In 1821 or 1822 there was a major slide in the Hagwilget Canyon, near Hazelton which blocked the access of the salmon to the Bulkley River. The Babine Carriers, as they were then described, at Hotset were then invited or permitted by the Gitksan to occupy the canyon site at Hagwilget from where they would have access to Skeena River salmon. Hagwilget has been a Carrier, now Wet'suwet'en, village ever since.

The evidence suggests that the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses, or wheeled wagons. Peter Skene Ogden, the controversial trader-explorer visited Hotset in 1836 and noted their primitive condition in his journal.

As already mentioned, McGillivray reached the Skeena-Bulkley forks in 1833, and the same year Brown reports the first indications of disease which from time to time ravaged the aboriginal populations.

Fort Wrangel in present-day Alaska was established in 1825; Fort Connolly, in 1826; Fort McLaughlin at Bella Bella in 1834; Fort Simpson near Prince Rupert in 1835; and the new Fort, called Fort Babine, was established in 1836 at the north end of Babine Lake, replacing Fort Kilmaurs which was some distance further south on the same lake.

In 1825 Brown reported that in revenge for a killing, the Gitksan had barricaded the river (presumably the Skeena or mouth of the Bulkley) to prevent salmon from reaching Hotset. There were other warlike barricades on the Babine River in this area, but Brown was usually able to resolve such disputes.

In 1826 trader Brown visited the Gitksan people along the Babine River but he did not, apparently, proceed as far as the forks of the Babine and Skeena, nor did he ever visit the Hazelton area, or the other Skeena villages in the territory. Brown found some of the Atna, as he called them, wearing some European clothing indicating that they had access to some European trade goods.

During this period, or earlier, Legait, a Tsimshian, enjoyed a trading monopoly on the middle Skeena which he or his family maintained well into the 19th century. Throughout his Journals Brown frequently recognized that he was having great difficulty competing with the traders from the coast, and that beaver returns were never what he hoped they would be. He had great difficulty getting the Indians in his area to be as industrious in their trapping as he wished they would be.

It is now necessary to turn to the political history of the province but I shall continue to make references to the territory.

## 6. The Colony of British Columbia

Nothing of much political importance occurred in what is now the province for some time following the voyages of Cook, Vancouver, Dixon, Barkley and others. The Hudson's Bay Company was headquartered near the mouth of the Columbia River where James Douglas had been its Chief Factor since 1839. Anticipating the loss of the Oregon Territory to the United States, however, the Company prepared to move its operations to Fort Victoria on Vancouver Island which Douglas had first visited in 1843.

By the Treaty of Washington in 1846 Britain and the United States settled the Oregon boundary dispute at the 49th parallel. This was a serious blow to the Company which had been heavily involved in the Oregon fur trade for many years.

In 1849 the Company was given a 5-year monopoly on the fur trade on Vancouver Island on the understanding that it would foster the settlement of the Island leading to the establishment of a colony. In that same year the Colony of Vancouver Island was established but Douglas was not immediately named Governor. Instead, Richard Blanshard preceded him in that position, there being concern about appointing such a strong Company man as Governor.

Douglas remained however as Chief Factor for the Company and in that capacity he negotiated 11 of a total of 14 treaties with Indians on Vancouver Island, mainly in the vicinity of what is now the City of Victoria. No treaties were ever negotiated on the mainland.

Douglas became Governor of the Colony of Vancouver Island in 1851.

As Douglas was a principal actor in setting the stage for much of the misunderstanding about Indian rights which later developed, it will be useful to mention that his policy for the mainland, as described in several pronouncements and correspondence with the Colonial Office in London, was that the colony would be opened up for settlement quickly so as to establish a British as opposed to an American community here. Lands actually occupied by Indians for village sites, together with their cultivated fields and adjacent hunting areas were to be reserved for them and excepted from pre-emption by settlers. Unlike the American experience where Indians were being confined by force to reserves, Indians in the Colony were entitled to the free use of all unoccupied lands. Until 1866 Indians had equal rights to pre-empt land for cultivation in the same way as all other subjects of the Crown.

Returning to the chronology, gold was discovered on the mainland in the mid 1850's and there was concern about the influx of American miners and a possible migration of the Mormon followers of Brigham Young into what is now British Columbia. This led to discussions about establishing a further colony and Douglas issued a proclamation (probably **ultra vires** but later ratified), warning that his permit was required for gold mining on the mainland.

It seems to be accepted by scholars that concern about American influences, mainly miners and Mormons, was indeed the principal reason for the establishment of a mainland colony, and it is likely this province would have become a part of the United States but for the measures taken by Douglas to ensure continued British control of the colony.

An Act of the Imperial Parliament dated August 2, 1858 provided for the Government of the Colony of British Columbia which was proclaimed November 19, 1958. Douglas was appointed Governor of the mainland colony as well as continuing as Governor of the Colony of Vancouver Island. On the same day the law of England as it then existed was introduced into British Columbia, and on December 2 Douglas issued a further Proclamation providing that the land of the colony could only be granted by him in his capacity as Governor.

There was an interesting exchange of letters between Douglas and the Colonial Office in London in 1861 when the former requested funds for the purchase of Indian lands on Vancouver Island but he was informed that such funds would have to be obtained out of the revenues of the colony. Douglas, however, instructed Col. Moody to mark out townsites for settlers, and reserves for Indians which would not be available for pre-emption. In 1863 the Legislative Council of Vancouver Island voted $9,000 for the acquisition of lands from the Cowichan and Chemainus Indians.

In the following year, 1864, a Legislative Council was established for the mainland colony and Douglas then retired.

In 1866 the two colonies of Vancouver Island and British Columbia were amalgamated into the Colony of British Columbia.

In 1867 the four original Provinces, Nova Scotia, New Brunswick, Lower and Upper Canada, formed the Canadian Confederation. In the same year the United States purchased Alaska from Russia.

The 1860's were also significant years in the territory. There were continuing small pox and other epidemics, trapping continued to be the principal commercial activity, and the Collins Overland Telegraph arrived at Kispiox in 1866 and pushed northwards for a few miles to Fort Stager where the line was abandoned because of the success of the trans-Atlantic cable. The Collins project, however, marked the introduction of horses into the territory, and provided employment for the local Indians as packers. In the same year the Hudson's Bay Company established its short-lived post at Hazelton.

The years 1870-71 saw the start of the Omineca gold rush and the commencement of the commercial salmon canning industry at the coast. This industry quickly attracted the attention of Gitksan men and women many of whom took annual employment at the coast during the fishing season. This has continued to the present time.

In 1871 British Columbia joined the Canadian Confederation. Some of the provisions of the Terms of Union, particularly No. 13 relating to the provision of lands for Indian reserves have led to a great deal of misunderstanding which will be more fully considered later. Generally speaking, all public lands became vested in the province which agreed to furnish adequate lands for reserves. Responsibility for Indians and Indian lands was assigned exclusively to Canada.

While some Indian reserves were established as early as the 1860's, the process was the subject of continuing correspondence and debate. Part of this centred on whether Indian land rights, which were never defined, should be extinguished by treaty as in Ontario and the United States, or whether reserves should be "adjusted." British Columbia consistently suggested the latter while Canada originally supported the former but gradually came to accept the position of the province.

Generally speaking, Canada at this time was negotiating treaties with nomadic or semi-nomadic Indians on the prairies which included the surrender of aboriginal "title," the payment of annuities or other payments, and Indian Reserves comprising hundreds and thousands of acres. Canada originally believed the same procedure should be followed in British Columbia.

The province, on the other hand believed Canada's position was unrealistic, and that its own policy, as first established by Governor Douglas, was entirely adequate given the different history and geographic circumstances of the province.

There were allegations that Canada had been deceived or mis-informed about the Indian policy of the Colony before Confederation, but that was denied by the province. That entire question will be examined later in this judgment.

This dispute continued for many years. In 1874 Lord Dufferin, the Governor-General reported to Lord Carnarvon, the Colonial Secretary, that British Columbia was behaving badly. A British Columbia Land Act was disallowed by the federal government and the Governor-General made a memorable public attack on the government of British Columbia.

The 1870-80's were turbulent times in the territory with some difficulty and much hard feeling. Specific incidents, such as the accidental burning of Kitsegeucla in 1872, Youman's murder in 1884, the killing of Kitwankool Jim (sometimes called the Skeena uprising) in 1888, and other incidents are examples of strained relations between the old and the new cultures. For reasons which seemed sufficient at the time, but which have caused great resentment, the federal government made the Indian potlatch illegal in 1884 and this provision was not repealed until 1951.

Although Surveyor Dewdney may have laid out some reserves in the territory as early as 1871, the first reserve commissioner to arrive there after Confederation was A.W. Vowell in 1890, but he did not actually create any reserves. In the following year, however, O'Reilly established reserves at many of the Skeena villages amid some hostility, particularly at Kispiox. At this time the population of Kisgegas, for example was only about 300 persons.

During all this period the Indians were leaving the distant areas of the territory to live in the villages in the transportation corridor.

The first farmers moved into the area around 1900 and there was much resentment, which continues to this day, about pre-emption of land occupied by Indians and over the issue of land script for veterans of the Boer War. This script was used to dispossess some individual Indians from land which they had been occupying, especially in the Bulkley Valley.

The construction of the Grand Truck Pacific Railroad from 1908 to 1914 provided some employment for the Indians, but also opened up this inviting country to further settlers.

In the meantime the dispute about Indian rights continued to simmer. The federal government was anxious to resolve the "rights" issue but the province was adamant that no such rights existed except claims to village sites and cultivated fields. In order to deal with reserves, the representative of the federal government, McKenna, agreed to "drop" the question of title, believing that the Courts, by an anticipated reference to the Exchequer Court (to which the province never agreed), would settle the rights problem in due course. Unfortunately, it never did.

As a result a Royal Commission known as the McKenna-McBride Commission was established in 1913 to adjust Indian reserves in the province. The commissioners unquestionably gave assurances to the Indians in the territory that the reserve adjustment process in which they were engaged could not deal with aboriginal rights or prejudice their claims which, the commissioners said, would be looked after by other means, more particularly by the proposed reference to the Exchequer Court.

The province and Canada each accepted the report of the Royal Commission but it dealt only with reserves and did not mention aboriginal interests.

By Order in Council P.C. 1265 dated July 19, 1924, Canada acknowledged that British Columbia had satisfied all the obligations of the Terms of Union respecting the furnishing of lands for Indian reserves and described the process as a "... full and final settlement of all differences between the governments of the Dominion and the Province ..." As the Dominion represented the Indians in this process, the province pleads P.C. 1265 as a release.

In 1927 a Special Joint Committee of the House of Commons and Senate enquired into "Indian affairs" and rejected all the claims of the Indians of British Columbia to anything except the reserves which had been allotted to them.

In 1938 British Columbia formally transferred to Canada all the lands which had been set aside as reserves for Indians.

Indians were given the right to vote in provincial elections in 1947. There were major revisions to the **Indian Act** in 1951 which repealed some of its most restrictive and offensive provisions particularly the prohibition against feasts and against claims related activities. The prohibition against pre-emption was not removed until 1953.

I do not find it necessary to discuss various policy statements made by Canada since **Calder** reflecting a changed federal attitude to Indian land claims, or indeed the recent statements made by the province in that connection, for these are political matters which do not bear upon the resolution of the legal issues which arise in this case.

In the foregoing overview, I have touched only briefly on matters which will be considered in greater detail in this judgment.

It now falls to this Court to pronounce on the important "rights" questions which the Indians say have been outstanding for so long, and which rights the province says have never existed or have been extinguished or settled with the constitutional representatives of the Indians.

# PART 5

# THE PLAINTIFFS

## 1. Present Social Organization

An understanding of the plaintiffs' case requires a brief description of the present social organization of the Gitksan and Wet'suwet'en people. This is necessary because one of the ingredients of aboriginal land claims is that they arise from long term communal rather than personal use or possession of land. In **Baker Lake,** to which I shall return in due course, Mahoney J. in **Baker Lake** said that plaintiffs asserting aboriginal interests must show, amongst other things:

> "That they and their ancestors were members of an organized society . . .,"

One of the plaintiffs' fundamental positions on this question is that the present social organization of their peoples is the result of evolution from what has existed in the territory from time immemorial. Thus, they say, it is possible to establish their case, in part, by inference from their present highly structured social organization.

The picture painted by the Indian witnesses and their anthropological experts suggested that all aboriginal life revolves around the Chief, Clan and House system, and around aboriginal use of, and connection with, House territories.

I do not question the social importance of these institutions but I regret to say that I believe the plaintiffs' evidence in this connection was overstated. I would not go so far as to characterize these institutions as a club, as one counsel incautiously did, but there are far too many instances disclosed in the evidence where the Indians themselves did not act in accordance with the crest system for me to elevate it to the high levels attempted at trial.

The requirement of social organization in the test for aboriginal interests is not a high one as I shall demonstrate when I discuss the authorities: **Re Southern Rhodesia,** (1918) A.C. 211 (J.C.P.C.).

In their opening, counsel for the plaintiffs asserted that the plaintiffs have formed a distinctive form of confederation between their Houses and clans and that they have always enjoyed a level of civilization which is at least equal to many others which have received much greater prominence. The defendants, on the other hand point to the absence of any written history, wheeled vehicles, or beasts of burden, and suggest the Gitksan and Wet'suwet'en civilizations, if they qualify for that description, fall within a much lower, even primitive order.

I have no doubt life in the territory was extremely difficult, and many of the badges of civilization, as we of European culture understand that term, were indeed absent. Because of the low threshold, however, it will be not be necessary for me to quantify the level of aboriginal social organization in the territory at any particular time. I agree that "feasting," and the House and clan system are important parts of the social organization of the Gitksan and Wet'suwet'en people, and that the Chiefs play an important role in those activities.

What follows is a brief recital of the most significant features of Gitksan and Wet'suwet'en cultural organization. At this stage I am merely summarizing what the Indian witnesses said on this question without attempting an exhaustive analysis. I can say, however, that the descriptions I heard tended to be both idyllic and universal, neither of which terms, in my view, accurately describe what "happened on the ground" in the day to day life of these people. Life for the Gitksan and Wet'suwet'en has never been idyllic, and universality in practice was seldom seen.

On the evidence, there are some, but not many, differences between the present social organization of the Gitksan and Wet'suwet'en people. This may well be because it is common for adjacent aboriginal people to "adopt" customs and practices from each other. That different people would have so many similar institutions and practices almost demonstrates the borrowing theory. Most of the experts believe the Wet'suwet'en adopted much of the culture of the Gitksan, but culture, like their languages, may well have travelled in both directions.

The fundamental premises of each people are firstly that persons must marry outside their clan (exogamy), and secondly, that all their people are divided by matrilinear descent into clans and Houses. Thus, every person born of a Gitksan or Wet'suwet'en woman is automatically a member of his or her mother's House and clan.

The interaction of these fundamental principles means that a father is always a member of a different House and clan than his children, and House property devolves always to the mother's side. The father's side (wilxsi'witxw in Gitksan, haldza in Wet'suwet'en), however, also plays an important role in this social order and has important responsibilities particularly in connection with funerals. Also, each person has rights (amnigwootxw, in Gitksan, neg'edeld'es in Wet'suwet'en) to the use of a father's House lands for a variable period of which there are several versions.

According to plaintiffs' counsel there are four Gitksan and four Wet'suwet'en clans which have some closely common names. The Gitksan clans are:

Ganeda or Lax See'l, (Frog Clan)
Lax Gibuu, (Wolf Clan)
Giskaast, (Fireweed Clan)
Lax Xskiik (Eaqle Clan).

The Wet'suwet'en clans are:

Laksilyu, (Small Frog Clan)
Gilserhyu, (Frog Clan)
Gitdumden, (Wolf Clan)
Laksamshu, (Fireweed Clan)

The plaintiffs' Outline of Argument lists 35 Gitksan chiefs of Houses claiming 98 separate territories, and 13 Wet'suwet'en chiefs of Houses claiming 35 separate territories.

The Gitksan recognize associations between Houses which have long-standing relations or common origins called "wil'nat'ahl." For example, Mrs. MacKenzie, Hereditary Chief of the House of Gylogyet claims the people of eight Houses (Kuamoon, Madik, Hlo'oxs, Luus, Wee Eelasst, Haaluus and Amagyat) as her wil'nat'ahl (people with whom she is connected, or "people who are closely woven together"). There are many other examples.

The evidence discloses that Houses have the capacity to merge or divide, so as to create amalgamated or new Houses. This sometimes happens when a House gets too large or too small. As House membership depends upon female members who alone can populate a House, it is sometimes necessary to take new members into a House by adoption, usually but not always females. This requires the approval of the Head Chiefs. Similarly, if a member marries an outsider, or within his or her own clan, then compliance with Gitksan and Wet'suwet'en law is sometimes achieved by the adoption process.

Each House has one or more "Hereditary Chief" as its titular head. Actually, however, the chiefs, one of whom is generally called the Head Chief ("Simoighet" in Gitksan, "Diniizee" in Wet'suwet'en) and lesser chiefs, "Wings of the Chief," are not truly "hereditary" by Euro-Canadian understanding because the office of chief does not automatically devolve to the next of kin upon the death or retirement of the old chief.

Instead, the Head Chief of a House is selected, sometimes at a very young age for future chieftainship, and sometimes for purely practical or political reasons. The selection process is a flexible one, involving the elders of the house, and sometimes the Head Chiefs of the other Houses of the clan.

For example, when Jeffrey Johnson (Hanamaxw) was alive it was generally believed that his niece, Mrs. Olive Ryan (Gwaans), would succeed him as chief of his House of Hanamaxw. When he died in 1966, however, Mrs. Ryan was not well so her daughter, Joan Ryan, who has lived and taught school in Prince Rupert since 1965, and still lives there, was selected to be head chief. She says she is able to discharge her chiefly duties notwithstanding her residence in Prince Rupert.

Similarly, James Morrison, who lived most of his life either in Kitwangak or on the northern territories of the House of Wiigyet, was made chief of a Kitwancool House as a result of some domestic politics that arose after the death of the former chief.

Lastly by way of example, Peter Muldoe was a senior chief in the House of Wiigyet, having the chiefly name of Wii Seeks. The Head Chief of the House of Gitludahl was Moses Morrison. In 1971 Mr. Morrison decided his chiefly name should be passed to Mr. Muldoe. When Mr. Morrison died in 1985 there was a family meeting which confirmed this selection. It was also decided that the related Houses of Waiget, Wii Seeks, Wiigyet and Gitludahl, all of the Fireweed Clan, would combine into the House of Gitludahl of which Mr. Muldoe became, and he still is, its Simoighet. Thus Mr. Muldoe, Gitludahl, claims to be the owner of a number of territories which, on the plaintiffs' theory of this case, have from time immemorial belonged to a House of which he was not a member until very recently. His children, of course, belong to their mother's House and his son Earl Muldoe is Delgamuukw, the first named plaintiff.

The members of a House are not always blood relatives, though they usually are.

There is no head chief for the clans but there is a ranking or order of precedence within certain communities or villages where one House or clan may be more prominent than others.

In addition, some Houses are associated together through family or other relationships brought about by separations, mergers or amalgamation of Houses. Thus, what may sometimes appear to be just one House may really be two or more Houses, and the opposite may also be true. For example, Mrs. Olive Ryan, whose chiefly name is Gwaans, is a Gitksan matriarch in the well known House of Hanamaux, but she claims she has territory of her own. Similarly, Mrs. MacKenzie is head chief of the House of Gylogyet, but she recognizes 4 sub-chiefs of her House whose ancestors were, in earlier days, the chiefs of separate Houses. On this question, as on many others, there seems to be considerable flexibility.

Next, I wish to discuss the particular role of House territories in the social organization of these people. It is the plaintiffs' position that each House "owns" one or more territories and most Houses "own" one or more fishing sites which they say have been used by them and their ancestors from time immemorial. Moreover, in a very few cases some chiefs claim they "own" other territories which their ancestors acquired from other Houses or other aboriginal peoples by settlement or peace treaty. For the purposes of this action, I regard such territories recently acquired territories as indistinguishable from other "owned" territories.

Although most House chiefs and members now live in or near the transportation corridor which I described earlier, their position is that these territories belong to them by aboriginal (and common) law by reason of use, possession and occupation from time immemorial, that they still use these territories (sometimes), and that they retain an actual and spiritual association or connection with these territories which preserves their entitlement.

Each House has some physical and tangible indicators of their association with their territories. For example, some Houses have totem poles on which are carved the crests of their Houses, while others have distinctive regalia. Most if not all Gitksan Houses have oral histories and an "adaawk" which is a collection of sacred oral reminiscences about their ancestors, their histories and their territories.

The Wet'suwet'en Houses do not have a true equivalent of an adaawk, but they each have a "kungax" which is a spiritual song or songs or dance or performance which ties them to their lands.

The spiritual connection of Houses with their territory is most noticeably maintained in the feast hall, where, by telling and re-telling their stories, and by identifying their territories, and by providing food or other contributions to the feast from their territories, they remind themselves over and over again of the sacred connection that they have with their lands.

Dr. Daly, one of the plaintiffs' anthropological witnesses added a perspective to the feast which I did not understand from the lay witnesses. I understood the witnesses to place greatest emphasis on having feasts for ceremonial purposes and for the purpose of making important decisions.

Dr. Daly suggested the underlying purpose of the feast was also to clear a person or family of debt or obligation. Other writers stress the re-distribution of wealth by a complicated system of contributions and gifts.

I suspect all these perceptions may be partly right although the emphasis I perceived from the lay witnesses was certainly different from that of the experts.

Dr. Daly's evidence brings up a painful subject. Historically, feasts often led to the actual or assumed obligation to give away property, and this sometimes produced exaggerated results when some Indians were persuaded or felt obliged to give away all or much of their property. This practice was not confined to the Indians of the territory but was widespread throughout the province.

As is so often the case in these matters there are two sides to the story. The Indians believe this aspect of feasting was and is a part of their tradition. The authorities regarded it differently. I do not find it necessary to attempt to pronounce on this question.

There were also some aboriginal practices associated with feasting which some persons of different cultural background classified as barbaric. These were some of the causes of an insult suffered by Indians which is still deeply resented.

These alleged excesses in feasting practices during the last century attracted the critical attention of both the clergy and the federal civil authorities. The clergy reacted predictably to what they regarded as heathenism; the civil authorities, on the other hand, found the practice of giving away all or most of one's property harmful to the indians and to the community generally. Each authority, for different motives, sought without success to eliminate feasting. As a result, the federal government imposed a legislative ban on feasting which is seldom a useful way to control or reform cultural practices. This prohibition continued in the Criminal Code until 1951 but it was no more successful than the American experience with a different kind of prohibition.

The plaintiffs allege that their Head Chiefs are the custodians of the names, crests and territories of the Houses. On the death of a chief a new chief is chosen, usually a niece or nephew but sometimes a brother or sister of the old chief. The succession of the new chief carries with it the name, regalia, territory and authority of the old chief. Occasionally, if there is no suitable successor, a caretaker chief from outside the House takes the chiefly name and keeps it until a new chief is ready to assume his rightful place. Steve Robinson, Spookw, of the House of that name, is an influential Gitksan chief who has been the caretaker chief of that House for many years.

It is the plaintiffs' position that these social and cultural practices have been firmly in place governing these people, their communities, and their lands, from time immemorial.

I turn next to describe other forms of Gitksan and Wet'suwet'en organization.

## 2. Band Councils

Band councils were first established by an early **Indian Act**, and they have been continued under successive revisions.

Under this legislation various bands councils have been established, usually associated with Indian reserves and geographic locations such as each of the Gitksan Skeena villages and the Wet'suwet'en villages of Hagwilget and Moricetown. These councils are elected by the registered members of the bands. Band membership is determined objectively under the **Indian Act.**

Many Indians object to the Band system, mainly because it was imposed upon aboriginal people arbitrarily. I gained the impression the Gitksan and Wet'suwet'en Band Councils are probably doing a fairly good job looking after their members but this may not be a universally held view. As very few non-chiefs gave evidence, I am not in a position to express any opinion on this question.

Many hereditary chiefs are elected to band councils, but they are not automatically councillors or chief councillors. Thus, Henry Alfred (Wah tah keg'ht) is Hereditary Chief of the House of that name which claims to own a large territory in which the village of Moricetown is situated. At the time of trial he was not a member of the Moricetown Band Council. On the other hand, Alfred Joseph (Gisday'wa) is a Wet'suwet'en hereditary chief claiming a large territory near Houston yet he has lived most of his life at Hagwilget where he was for many years a member of its band council and, until quite recently, its Chief Councillor.

The band councils usually maintain offices with a paid staff in their respective villages. Doris Wilson-Kenni, a sub-chief in the House of Spookw, and a prominent witness at trial, is the manager of the Hagwilget Band Council.

Generally speaking, the band councils concern themselves with municipal-type functions including welfare, health and education, but they have gradually assumed municipal responsibilities. They negotiate for and administer funds provided by Canada, and they administer Indian reserves established under the **Indian Act.**

It was suggested in the evidence, and in argument, that the band councils are the **alters ego** of the Hereditary Chiefs but I am also unable to express any opinion on that question. Some very senior hereditary chiefs are heavily involved in the Band system, and I suspect the elected Band Councils are as representative of the total Indian populations in their areas as the Hereditary Chiefs. I believe these councils are independent of the chiefs although I have no doubt they respect the chiefs in the sense that one renders unto the holder of an office that which is appropriate.

### 3. Tribal Councils

Quite recently, tribal councils have been established by the Indians as coordinating agencies. Originally, the tribal council operating in the territory was called the Gitksan-Carrier Tribal Council. It first advanced a comprehensive land claim for most of the territory in 1977. Then in 1978 the present Gitksan-Wet'suwet'en Tribal Council was incorporated and I am aware that there are other tribal councils in other areas of the province such as the Carrier-Sekanni Tribal Council and others.

In addition to its coordinating function, the Gitksan-Wet'suwet'en Tribal Council could be described as the political arm of these Indian peoples, particularly in connection with land claims. Most of the territorial and "expert evidence" research for this case has been the responsibility of the tribal council. Mr. Neil Sterritt, Jr., the past president of the tribal council, has been particularly active in the collection of territorial evidence. I have no doubt this litigation has been largely directed by the tribal council. This is not to say that the chiefs have not played a role in the conduct of this case although they have complained about a lack of consultation about it.

The by-laws of the Gitksan-Wet'suwet'en Tribal Council specified that the members of the council would be elected by the 7 villages of Gitwangak, Gitseguecla, Glen Vowell, Kispiox, Gitenmaax (Hazelton), Hagwilget and Moricetown. The Gitksan village of Kitwancool did not join the tribal council. The legally incorporated Gitksan-Carrier Tribal Council was dissolved for unexplained political, tactical or other reasons during the course of this litigation, but it carries on the same functions as an unincorporated society with its office and staff at Hazelton.

It was also suggested that the tribal council is the **alter ego** of the hereditary chiefs, but again I cannot be sure about that. The tribal council, in my view, is the political instrument of the band councils. Most members of the tribal council are hereditary chiefs but not necessarily simoighet. The current president of the tribal council is Mr. Don Ryan whose sister, Joan Ryan, is the hereditary chief of the House of Hanamaxw. Although Mr. Ryan has a chiefly name in that house, I do not accept that Ms. Ryan and the other hereditary chiefs directly or indirectly control the operations of the tribal council although they undoubtedly have influence. The tribal council seems to have far more direct political power and authority than the hereditary chiefs.

I conclude there are, as might be expected, several layers of social organization of which the band councils, the tribal councils and the hereditary chiefs of the Houses are all significant participants. It is difficult for a cultural outsider accurately to assess the real and present interaction of these organizations. Because of the view I have of this case, it will not be necessary for me to do so.

I wish to say, however, that I shall leave this case with the settled conviction that, in the long run, the greatest value of this case, apart from being the first stage in the settlement of legal rights, may well be the enhancement of interest in Gitksan and Wet'suwet'en languages, traditions and cultures. This is because the evidence satisfies me this case has been a "Battle of Britain" for these peoples and it has inspired them to renew (an accurate word, in my view) what was a declining interest in their aboriginal heritage. The interest and activity generated by this law suit assures the survival of these peoples as distinct societies. This may at one time have been doubtful but I now believe it is a certainty. I accept that the chiefs or the band councils started this process, but the tribal council has provided the energy and leadership to see it through to the end for which the Gitksan and Wet'suwet'en people should be grateful.

# PART 6

## THE NATURE OF THE ACTION

### 1. The Plaintiffs

Instead of bringing this action in the name of the Tribal Council, or Bands on behalf of the Gitksan and Wet'suwet'en people, the actual plaintiffs in this action are 39 hereditary Gitksan and 12 Wet'suwet'en (total 51) chiefs for all or most of the Houses of the Gitksan and Wet'suwet'en peoples, except of course, the 12 Kitwancool chiefs.

The theory of the plaintiffs is that their chiefs are themselves, as well as on behalf of Houses or members, entitled to a judgment declaring their ownership, under Canadian, Gitksan and Wet'suwet'en law of the individual territories they claim. There is no specific alternative claim pleaded by the plaintiffs collectively for the territory or any part of it on a communal, people-wide basis.

The Statement of Claim alleges that these hereditary chiefs individually bring this action on behalf of themselves and on behalf of their House or its members. As mentioned, some plaintiff-chiefs purport also to represent other named Houses.

Thus there are 51 named plaintiff-chiefs who purport to represent a total of 71 Houses, although that may not be strictly accurate because the House of Wiigyet is included in both paragraphs 32 and 48 and there may be other anomalies. Mr. Grant told me there are 133 separate territories. Many chiefs claim more than one territory for their own Houses. For example, Hagwilnegh claims 5 widely separated territories.

In the early stages of the trial plaintiffs' counsel indicated that this case, unlike **Calder,** was "all or nothing," that is the claim was for ownership and jurisdiction, and the plaintiffs were not seeking any lesser relief. This position was wisely moderated later in the trial when Mr. Grant made it clear that the plaintiffs were also seeking a declaration of their aboriginal rights. He said that while ownership and jurisdiction were the plaintiffs' primary claims, they wished the Court to grant them whatever other rights they may be entitled to.

This statement was made on February 12, 1988 during the argument leading to unreported Reasons for judgment on this and other questions dated February 18, 1988 in which I said:

> "In my view it is highly doubtful if the plaintiffs have sufficiently pleaded **Calder** type or other alternative claims to aboriginal rights additional to the claim to ownership and jurisdiction. Such claims are pleaded, if at all, obliquely such as in paragraphs 57 and 75 and by reference to aboriginal rights in paragraphs 74, 74(a) and in Prayers to Relief 6 and 9.
>
> It is not for me to suggest or require amendments and it may be that the course of the trial, including the clear statement made by Mr. Grant on

> February 12th, 1988 will be sufficient to permit the plaintiffs to assert alternative claims additional to ownership and jurisdiction. I leave that question for the time being to counsel."

Since that time we have heard a great deal of evidence and argument, and although there have been 8 Amended Statements of Claim, no amendment in this connection has been sought. Because of the course of the trial, and notwithstanding the consistent and firmly stated position of the province to the contrary, I find that a claim for aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action.

That being so, it is probably unnecessary to review the Statement of Claim. However, those reading these Reasons may be curious to know precisely what has been alleged so I shall set out a brief narrative summary of the allegations subsequent to the first paragraphs of the finally Amended Statement of Claim. The early paragraphs only identify the plaintiffs. That part of the Statement of Claim is reproduced in Schedule 2.

The Statement of Claim alleges:

(1) The plaintiffs represent all the Gitksan people (except those in the Houses of the Kitwancool Chiefs), and all the Wet'suwet'en people, and each nation shares a common territory, language, laws, spirituality, culture, economy and authority (paras. #52 and #54);

(2) The plaintiffs are descendants of and successors to the hereditary Gitksan and Wet'suwet'en chiefs and were so on October 23, 1984, the day on which the Writ in the action was issued (para. #55);

(3) The plaintiffs have owned and exercised jurisdiction over the lands described in Schedule A and B which are called "the Territory" (para. #57). (This "Territory" has been amended a number of times as will be discussed later.)

(4) Since time immemorial the plaintiffs and their ancestors have:

- (a) lived within the Territory;
- (b) harvested, managed and conserved the resources within the Territory;
- (c) governed themselves according to their laws;
- (d) governed the Territory according to their laws and spiritual beliefs and practices;
- (e) exercised their spiritual beliefs within the Territory;
- (f) maintained their institutions and exercised their authority over the Territory through their institutions;
- (g) protected and maintained the boundaries of the Territory;
- (h) expressed their ownership of the Territory through their regalia, adaawk, kungax and songs;
- (i) confirmed their ownership of the Territory through their totem poles;
- (j) asserted their ownership of the Territory by specific claims. (para. #57)

(5) The right to own and exercise jurisdiction over the territory of the Gitksan and Wet'suwet'en Chiefs, and the resources thereon and therein was at all material times a right enjoyed by the Gitksan and Wet'suwet'en chiefs and the members of their Houses (paras. #59 and #60);

(6) The plaintiffs and their ancestors exercised a jurisdiction over the territory as against other aboriginal people (para. #61);

(7) The plaintiffs have enjoyed and still enjoy their aforementioned rights as recognized and confirmed by the Royal Proclamation of 1763 which, the plaintiffs say, applies to British Columbia (paras. #63 and #64);

(8) Alternatively, by virtue of the Royal Proclamation, the plaintiffs enjoy rights of ownership and jurisdiction to the territory (para. #66);

(9) The Constitution Act, 1867, s.91(24), gave the Sovereign in Right of Canada the exclusive right to obtain the surrender of the plaintiffs' rights in respect of their lands and that any rights of the defendants thereto under s.109 are subject to the plaintiffs' ownership and jurisdiction (para. #67);

(10) That the Terms of Union of British Columbia, 1871 and the Constitution Act, 1982 ss. 25, 35, 37 and 52 preserve the plaintiffs' aboriginal rights to the territory including ownership and jurisdiction which are paramount to all enactments, past and present, of the Province of British Columbia (paras. #68 and #69);

(11) That no part of the territory, no resources thereon, nor the jurisdiction thereover of the plaintiffs' chiefs have ever been surrendered, ceded to or purchased by the Imperial, Federal or Provincial Crown or by any person on behalf of any Crown at a meeting of assembly or otherwise (para. #70);

(12) Customary and conventional international law requires the provincial defendant to recognize and confirm the right of the plaintiffs to ownership and jurisdiction over the territory (para. #71);

(13) The plaintiffs have never ceased to assert their aboriginal title, ownership and jurisdiction and right of possession of the territory in accordance with their aboriginal laws and practices (para. #72);

(14) The laws of British Columbia are subject to the plaintiffs' aboriginal title, ownership and jurisdiction (para. #73);

(15) The aboriginal title, jurisdiction and ownership of the plaintiffs has not been and cannot be extinguished without their consent (para. #74);

(16) Alternatively, that no notice of extinguishment has ever been given (para. #74(a));

(17) That the provincial defendant has wrongfully alienated lands within the territory and deprived the plaintiffs of the right of ownership and jurisdiction, causing the plaintiffs loss and damage (paras. #75, #76 and #77).

(18) As a result, the plaintiffs claim relief which appears in the Statement of Claim as follows:

### I. THE CONTENT OF ABORIGINAL RIGHTS

1. A declaration that the Plaintiffs have a right to ownership of and jurisdiction over the territory.
2. A declaration that the Plaintiffs' ownership of and jurisdiction over the Territory existed and continues to exist and has never been lawfully extinguished or abandoned.
3. A declaration that the Plaintiffs' rights of ownership and jurisdiction within the Territory include the right to use,

harvest, manage, conserve and transfer the lands and natural resources, and make decisions in relation thereto.

4. A declaration that the Plaintiff's rights to jurisdiction includes the right to govern the Territory, themselves, and the members of the Houses represented by the Plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop.

5. A declaration that the Plaintiffs' rights to ownership of and jurisdiction over the Territory include the right to ratify conditionally or otherwise refuse to ratify land titles or grants issued by the Defendant Province after October 22, 1984, and licences, leases and permits issued by the Defendant Province at any time without the Plaintiffs' consent.

6. A declaration that the aboriginal rights of the Plaintiffs including ownership of and jurisdiction over the Territory are recognized and affirmed by Section 35 of the Constitution Act, 1982.

## II. RESTRICTIONS ON THE DEFENDANT, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

7. A declaration that the Defendant Province's ownership of lands, mines, minerals and royalties within the Plaintiffs' Territory is subject to the Plaintiffs' rights of ownership and jurisdiction pursuant to Section 109 of the Constitution Act, 1967.

8. A declaration that the Defendant Province's jurisdiction over the Territory, the Plaintiffs and members of the Houses represented by the Plaintiffs is subject to the Plaintiffs' right to ownership and jurisdiction.

9. A declaration that the Defendant Province is not entitled to interfere with the aboriginal rights and title, ownership and jurisdiction of the Plaintiffs.

10. A declaration that the Defendant Province cannot appropriate any part of the Territory through grants, licences, leases, permits or in any other manner whatsoever.

11. A declaration that the Defendant Province cannot issue or renew grants, licences, leases or permits authorizing the use of any resources within the territory of the Plaintiffs by the Defendant Province, its agents or by third parties without the consent of the Plaintiffs.

## III. DAMAGES

12. A declaration that the Plaintiffs are entitled to damages from the Defendant Province for the wrongful appropriation and

use of the Territory by the Defendant Province or by its servants, agents or contractors without the Plaintiffs' consent.

### IV. TRANSITIONAL RELIEF

13. A lis pendens against the Defendant Province over the Territory described in Schedule 'A' and delineated in the map which is set out in Schedule 'B'.
14. A declaration that this Honourable Court shall retain jurisdiction to resolve all outstanding disputes between the parties as to the implementation of the Declarations and Orders of this Honourable Court.
15. The costs of this action.
16. Such further and other relief as to this Court may seem just.

## 2. The Plaintiffs' Claims against Canada

The plaintiffs did not include the Attorney General of Canada as a defendant in this action. He was added as a defendant on the application of the province largely for the purpose of binding Canada to the result of this trial, possibly for the purposes of proceedings in another court.

At the time of the argument in February, 1988, the plaintiffs asserted the paramountcy of their aboriginal interests over the laws of Canada. After hearing argument on the pleadings I said this:

> "But I agree with Mr. Macaulay that the Statement of Claim does not sufficiently allege the "paramountcy" of the plaintiffs' alleged rights over federal legislation such as that relating to fisheries and transportation. I do not think, in the present state of the pleadings, that the plaintiffs, even if entirely successful against the province, would be entitled to a Judgment that would not be subject to federal legislation relating to such matters as fisheries, railways, airports, and other activities authorized by federal legislation."

No amendment was sought on this question, and no arguments was made by the plaintiffs to the contrary. I now confirm that, on the pleadings and the applicable law, the plaintiffs are not entitled to any relief against Canada and the action against Canada must be dismissed.

## 3. The Counterclaim of the Province

Without pleading any facts additional to those alleged in its Statement of Defence, the province claims a declaration only against the plaintiffs, and not against Canada. It claims:

> "1. A declaration that the Plaintiffs have no right, title or interest in and to the Claim Area, and the resources thereon, thereunder or thereover;
>
> 2. Alternatively, a declaration that the Plaintiffs' cause of action, if any in respect of their alleged aboriginal title, right or interest in and to the Claim Area and the resources thereof, thereunder or thereover is for compensation from Her Majesty the Queen in right of Canada."

I shall discuss this Counter Claim further in due course.

## PART 7

## SOME COMMENTS ON EVIDENCE

I have said this case is largely about land. The plaintiffs seek a declaration of title or ownership, jurisdiction and other aboriginal rights. The title they seek is not the conventional fee simple well known and understood in our law. While admitting that the underlying, or allodial or radical title is in the Crown, the plaintiffs say their aboriginal title is a burden on the title of the Crown which entitles them, at least with respect to unalienated land (and compensation for everything else), to ownership and possession of, and jurisdiction over the territory. This is said to arise from continuous and uninterrupted occupation and possession of the territory by the plaintiffs and their ancestors in an organized society. They say this has continued to the present from time immemorial, or for an indefinite, long time prior to their first contact with members of a European or any foreign civilization, and prior to the assertion of Sovereignty by the Crown.

The plaintiffs seek to establish their case in a number of ways.

Firstly, they say their ancestors, in an organized society, have occupied, used and managed the territory from time immemorial and certainly before contact with European civilizations.

Secondly, they say they are presently an organized society with common languages, traditions and cultures similar in all important respects with the kind of social organization enjoyed by their ancestors.

Thirdly, the plaintiffs say the proof of the connection between pre-contact and present Gitksan and Wet'suwet'en societies is found in their languages, genealogies, customs and oral histories. They say these features establish the continuation of their particular and unique societies forward in time from pre-contact to present, and backward in time from the present to the pre-contact era.

They say their oral histories have other uses and that their case does not depend merely upon the literal accuracy of these histories to establish a connection with past societies. The oral histories are also relied upon by social and other scientists as evidence supporting and confirming their theories or findings which indicate a genuine connection between present and past aboriginals, and in this way the plaintiffs seek to tie the two societies together. These sciences include archaeology, linguistics, anthropology, history, and many other disciplines.

There is another dimension to the oral histories relied upon by the plaintiffs and that is the Gitksan adaawk and the Wet'suwet'en kungax. In one sense these adaawk and kungax are a special kind of oral history, but the plaintiffs say they are more than that. They are a sacred "official" litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House which is repeated, performed and authenticated at important feasts. It is an official statement of the sacred culture of a House. As it is said to contain a statement or description of the territory of a House, the plaintiffs contend that it constitutes an admissible declaration of title and an exception to the Hearsay Rule.

There is a distinction to be kept in mind between an adaawk, which is the "official" or sacred statement of the history, law, customs, and traditional territory of a house, with what Mrs. MacKenzie called the "antimahlaswx" or collection of stories or folklore of a house. I have great difficulty, as did many witnesses, separating histories and declarations of aboriginal interests from stories.

At an early stage of the trial I expressed the hope that I could make a convenient but simplistic distinction between what European-based culture would call mythology and "real" matters. This was because some Indian witnesses included some material which might be classified as mythology within their adaawk, possibly because some of these events are believed to have occurred within territories they claim, and possibly because their Houses have adopted crests inspired by these events or beliefs which are integrated into their adaawk. I have concluded that it would be overly simplistic to attempt such a distinction, and I must accordingly reject mythology as a valid distinction between what is and what is not part of an adaawk or kungax.

This distinction between the authenticity of an adaawk and matters of folklore has not, so far as I can ascertain, been recognized or applied by any of the scientists who gave evidence at trial. The late Marius Barbeau, who was described as an excellent collector and historian of aboriginal culture, and whose work is highly regarded, has produced useful collections of adaawk and oral histories which include much "supernatural" material.

The Wet'suwet'en kungax seems to be quite different from an adaawk. A kungax is more in the nature of a song or "trail of songs" or dance or performance which is intended to represent the special authority and responsibilities of a chief, and the connection of the House with its territory.

Later in this judgment I shall deal specifically with a number of classes of evidence (including adaawk and kungax), upon which the plaintiffs rely for the proof of this connection with the past, and kungax.

As I have said, many social and other scientists whose evidence was adduced by the plaintiffs, have relied in part upon oral histories, adaawk and kungax to buttress the sparse evidence which exists about the social order and identity of the occupants of the territory prior to and in the early period after contact. Again, I have found this kind of evidence admissible but subject to considerations of weight.

In an earlier judgment in this case, reported incorrectly as **Uuke v. R.** (1987) 15 B.C.L.R. (2nd) 326 (B.C.S.C.), I expressed some views I then entertained about the admissibility of out of court declarations of deceased persons about the ownership and use of the territory. I admitted most of such evidence, subject to objection and weight, and I also mentioned that I would try to deal more specifically with such matters at the end of the trial. As so often happens in such circumstances, most of these evidence questions have been subsumed into larger and more difficult issues. Subject to what follows in this judgement, I see no reason to change the views I stated in 1987.

I remain persuaded that oral declarations of a reputation of ownership made by deceased persons, whether included in an adaawk or otherwise, is admissible on a question of an interest related to land. But I would be going outside the confines of the law if I were to accept, as proof of ownership or title, evidence of statements:

> (a) made or imputed to deceased persons who purported to pronounce upon this question of title or ownership instead of giving evidence of a reputation of ownership; or
>
> (b) made by presently living persons either in the form of a pronouncement or of a reputation.

There is a great deal of evidence which falls into each of these categories and I cannot possibly identify it all. As best I can, I must decide these questions relying only upon admissible evidence. Probably because of my ruling on admissibility and weight, counsel in argument did not specifically direct my attention to many such matters.

I also believe I may rely upon oral, historical and other cultural "material" including treatises in accordance with the judgments I delivered in this case, reported as **Delgamuukw (Muldoe) v. A.G. for B.C.**, (1989) 38 B.C.L.R. (2nd) 165 and 176 from which I see no reason to depart.

Before and since those judgments, however, I have heard the evidence of numerous scientists who, for the purpose of their disciplines, have relied to some extent upon oral "material" (a neutral word) even though some of it has now been reduced to writing by anthropologists and others which adds still another dimension of difficulty to the weighing process. As an example, the plaintiffs' archaeologist Sylvia Albright relied to some extent upon on what she called ethnoarchaeology. The adaawk of the "Seeley Lake Medeek," which I shall describe later, is an example of the plaintiff's attempt to connect a scientific finding to a pre-historic event.

There are differences of academic opinion on many of theses questions. For example, Phillip Drucker in **Cultures of the North Pacific Coast,** 1955, believes oral histories on the north coast are usually correct, while Dr. Bruce Trigger in **Time and Traditions, Essays in Archaeological Interpretation** says, at p. 126:

> "Another source of information about the past is the stories living peoples tell about their own history. This is often referred to as oral tradition (Vansina 1965: 1-18; McCall 1964: 37-61). Such traditions frequently reflect contemporary social and political conditions as much as they do historical reality and even in cultures where there is a strong desire to preserve their integrity, such stories unconsciously may be reworked from generation to generation. The oral traditions of Polynesia, which were famous for the fidelity with which they were supposed to be transmitted, are now known to be out of line with archaeological and other sorts of evidence. (Suggs 1960: 47-56). Hence it is no wonder that many anthropologists doubt the historical reliability of all oral traditions. Murdock (1959a: 43) has claimed (without documentation) that African oral traditions concerning the origins of a tribe that are over a century old are correct less than 25 percent of the time.
>
> The scientific study of oral traditions is obviously an exacting task and requires a careful evaluation of the reliability of sources, the identification of stereotyped motifs that may distort historical evidence, the checking of the stories told by one group against comparable information supplied by others, and, finally, the checking of these stories against independent sources of information such as archaeological evidence.
>
> **Used in this way, oral traditions may supply valuable information about the not too distant past. Used uncritically, however, they can be**

> **a source of much confusion and misunderstanding in prehistoric studies.** (my emphasis)
>
> The small populations of tribal societies, and their general lack of concern with the inheritance of private property, tend not to produce the systematic variations in oral traditions that are useful for evaluating their historical authenticity.
>
> The recording of oral traditions as well may be suspect. The few committed to writing in eastern Canada prior to the late nineteenth century were done in an extremely cursory fashion and from poorly identified sources (Trigger 1972: 71-83). At least some of these oral traditions appear to have been heavily influenced by White historical narratives, missionary propaganda, and even anthropological publications (Hamell 1982: 45). They also frequently reflect knowledge of periods later than those to which they are alleged to refer. In general, some kind of independent verification is required before such traditions can be accepted as accurate historical accounts.
>
> There have been many doubts expressed as to the archaeologist's abilities to attribute ethnic identity to archaeological assemblages. Some of these doubts have been aired in connection with the problem of identifying Plateau Athapaskans. For example, Fladmark has stated:
>
>> The "Athapaskan Question" in the end, is the question whether archaeologists can distinguish any historic ethnolinguistic group in millennia-old simple stone tool kits . . . the answer must be "no" at least until we seriously reassess our methods and realistically evaluate the true resolving power of archaeological data. (1979: 253-254).
>
> In a similar vein, Donahue remarked on the state of research into antiquity of Athapaskan cultures on the Plateau ' . . . the isolation of historic material culture sets by language group would be extremely difficult if not actually impossible.' (1977: 108)
>
> This paper is an attempt to show that with continued refinement of our analytic methods, archaeological ethnicity can be realized."

Notwithstanding these warnings, many writers seem to believe that, with proper care and much verification, ethnoarchaeology, for example, may well provide useful information "to fill in the gaps" left at the end of a purely scientific investigation.

I am disposed, with considerable hesitation, and with due allowances for weight, to recognize that culture, in a generic sense, may have a role in the formulation of opinions in these sciences. In a case such as this, however, where the plaintiffs and their ancestors are the only sources of these histories, the Court may not be the best forum for resolving such difficult and controversial academic questions. One cannot, however, disregard the "indianness" of these people whose culture seems to pervade everything in which they are involved. I have no doubt they are truly distinctive people with many unique qualities.

For example they have an unwritten history which they believe is literally true both in its origins and in its details. I believe the plaintiffs have a romantic view of their history which leads them to believe their remote ancestors were always in specific parts of the territory, in perfect harmony with natural forces, actually doing what the plaintiffs remember their immediate ancestors were doing in the early years of this century. They believe the lands their grandparents used have been used by their ancestors from the beginning of time. They believe their special relationship with land has always been enlightened. And they believe Indian social organization in the territory has always been more or less as it is now.

Indian culture also pervades the evidence at this trial for nearly every word of testimony, given by expert and lay witnesses, has both a factual and a cultural perspective. For example, when a witness described how his grandparents were dispossessed by pre-emptors in the early years of this century from land they were using in the Bulkley valley they described a specific event which is relatively easy to analyze. I can regret the occurrence, but I must categorize it as a wrong not actionable in a communal claim. I am left to consider what weight the event deserves on issues such as use and occupancy of land and, possibly, internal boundaries and other issues. I can separate this event into different legal issues. To the plaintiffs it was an indivisible wrong which cries out for redress.

When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. For example, I do not accept the proposition that these peoples have been present on this land from the beginning of time. Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence in accordance with legal, not cultural principles.

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.

As with so many cases, this one sorts itself out in such a way that the legal issues fall to be decided not on the validity of the plaintiffs' beliefs but rather by the application of legal principles to what they actually say within the totality of all the evidence. I do not find it necessary to reflect in any way upon the **bona fides** of the plaintiffs.

This does not mean that I accept all of their evidence. As I shall endeavour to explain, much evidence must be discarded or discounted not because the witnesses are not decent, truthful persons but because their evidence fails to meet certain standards prescribed by law. For example, the fact that the plaintiffs' claim has been so much discussed for so many years, and the further fact that so much of the evidence was assembled communally in anticipation of litigation, or even during this litigation, is a fact which must be taken into account. Further, when so much evidence is collected as in this case, there are bound to be contradictions and inconsistencies which also must be taken into consideration. In this case, the legal principle that a single inconsistent fact may destroy an hypothesis must not be given undue weight and I have attempted not to be swayed by minor inconsistencies. Unfortunately, however, as will appear, some of these inconsistencies, alone or in the context of all of the evidence, are too great to be disregarded.

As will be shown, I do not accept that the immediate and more remote ancestors of some of the plaintiffs were eking out an aboriginal life in all parts of the territory for a long, long time. In fact, I am not able to find that ancestors of the plaintiffs were using all of the territory for the length of time required for the creation of aboriginal rights, and I shall give my reasons in due course.

I must briefly discuss the evidence of Drs. Daly and Mills and Mr. Brody because of the importance attached to it by the plaintiffs. These anthropologists studied the Gitksan and Wet'suwet'en people intensively. Drs. Daly and Mills actually lived with the Gitksan and

Wet'suwet'en for 2 and 3 years respectively after the commencement of this action. Their type of study is called participant observation but the evidence shows they dealt almost exclusively with chiefs which, in my view, is fatal to the credibility and reliability of their conclusions.

This evidence was seriously attacked on various grounds, particularly that they were too closely associated with the plaintiffs after the commencement of litigation, that Dr. Daly produced no notes of his "observations," that Dr. Mills was more interested in reincarnation than Wet'suwet'en culture, and that they did not conduct their investigations in accordance with accepted scientific practices.

With regard to Dr. Daly, he made it abundantly plain that he was very much on the side of the plaintiffs. He was, in fact, more an advocate than a witness. The reason for this is perhaps found in the Statement of Ethics of the American Anthropological Association which Dr. Daly cites at p. 29 of his report, as follows:

> "Section 1. Relations with those studied; In research, an anthropologist's paramount responsibility is to those he studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honour their dignity and privacy.

Honestly held biases were not uncommon with many of the professional witnesses which is not unusual in litigation. I do not think it is necessary to analyze the evidence of all the witnesses, and I shall not even mention some of them. As Dr. Daly was an important witness, however, I am constrained to say, with respect, that I have considerable difficulty with his evidence for a number of reasons. Throughout his long report, 691 pages, about which he gave evidence for about 10 days, he seems to be describing a society I do not recognize from the evidence of the lay witnesses, In fact, I felt constrained to comment during his evidence that one would almost think the motor vehicle had not been invented. Many of his propositions are based on facts not proven in evidence.

First, he placed far more weight on continuing aboriginal activities than I would from the evidence although he recognized the substantial participation of the Indians in the cash economy. For example, at p. 95 he mentioned that Gitksan and Wet'suwet'en persons regarded their land as "their food box and their treasury" and young persons going hunting often say "we are going to the Indian supermarket, to our land," yet many witnesses said the young people are not interested in aboriginal activities. At on p. 118 he recognized "Country food may not at all times be a major source of food for all families." I find it is seldom a major source.

Secondly, at p. 145 Dr. Daly said the House group, through its chief or senior matrons "ensure[s] that a substantial portion of House members' income from small enterprises and wage labour is devoted to the proper conduct of House affairs." With respect, I think this confuses the practice of chiefs making substantial contributions to feasts in which they are particularly interested with the day to day life of these people. While I assume they regularly take part, it was not proven the non-chiefs, of which only 1 or 2 gave evidence, are supporting the feast as Dr. Daly suggests. The general practice of which he spoke was not proven at trial.

Thirdly, on p. 139 Dr. Daly said:

> "in economic terms the Houses own the rights to the labour of their sons and daughters, and of their daughters' offspring, and they of course own lands and river sites as well.

This was not proven at trial and I have no reason to believe it is true.

Fourthly, I found Dr. Daly's report exceedingly difficult to understand. It is highly theoretical and, I think, detached from what happens, "on the ground." There are many passages which I do not understand, such as this one from p. 247:

> The world view of those living close to nature in a non-centralized, kinship society, reflect the basic reciprocal principle which governs day-to-day social relations in the society itself. On one hand, nature's life force is seen to nurture the people; on the other, nature exacts its price from the people, its life force feeding in turn, upon the people and their society, consuming them, causing death so as to nurture rebirth. The House group's proprietary representative, its leader or chief, exercises a reciprocal stewardship vis-a-vis the land, and at the same time, a proprietary right toward this land vis-a-vis the claims of other groups or nations. On one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership. On the other hand, the land is non-property when it is viewed in terms of the people's relationship to the life force in the natural world.

Most significantly, Dr. Daly lived with these people for 2 years, while this litigation was under way making observations on their activities, listening, and, I think, accepting everything they said, without keeping any notes. Further, he was not aware of a comprehensive survey of over 1,000 persons conducted by the Tribal Council in 1979 which achieved an 80% return. This survey disclosed, for example, that 32% of the sample attended no feasts, and only 29.6% and 8.7% engaged in hunting and trapping respectively.

A question arose about the admissibility of this survey. I doubt if the plaintiff's could have adduced it without proving it was conducted scientifically, but it was admissible in cross-examination particularly for the purpose of testing the sufficiency of an expert's data base.

Apart from admissibility as evidence of its contents (for I have no way of knowing if the survey is accurate or representative, although some of its results tend to confirm the view I obtained of present Indian life), its significance is more in the fact that it was kept from Dr. Daly. Many of his views of Indian life may have been markedly different if he had access to this substantial body of information in the possession of his clients. For these reasons, I place little reliance on Dr. Daly's report or evidence. This is unfortunate because he is clearly a well qualified, highly intelligent anthropologist. It is always unfortunate when experts become too close to their clients, especially during litigation.

Dr. Mills, the plaintiffs' other principal anthropologist, also showed she was very much on the side of the plaintiffs. She has almost completely changed her opinion from that contained in her June 1986 draft where she attributed almost all Wet'suwet'en social organization, including the kungax, to borrowings from the Gitksan or other coastal Indians. This is a startling departure from a large body of professional opinion on the part of a witness closely associated with the beneficiaries of her new opinion.

Again, however, apart from urging almost total acceptance of all Gitksan and Wet'suwet'en cultural values, the anthropologists add little to the important questions that must be decided in this case. This is because, as already mentioned, I am able to make the required important findings about the history of these people, sufficient for this case, without this evidence.

Lastly, I wish to mention the historians. Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves. Each side was able to point out omissions in the collections advanced on behalf of others but nothing turns on that. I do not accept that part of the evidence of Mr. Williams which suggests legal consequences from Gitksan or Wet'suwet'en compliance with Canadian law.

The exception to the above was Dr. Farley who was not just a collector and explainer of history by the use of interesting maps. He also offered numerous useful opinions which I generally accept although I do not find it necessary to express an opinion on his conclusions about which east-coast rivers "fall into the sea."

# PART 8

# THE HISTORY OF THE GITKSAN AND WET'SUWET'EN PEOPLE

## 1. General

In this section I shall endeavour compendiously to discuss a number of issues that took a great deal of time at trial. At the end of this section I shall state an important finding which will permit me then to confront the legal issues which arise in this case.

I shall first discuss some further evidence problems, and then examine the different ways by which the plaintiffs have sought to prove their history, and their connections with the territory.

The history of the association of these people with the territory is a crucial part of their case and its proof is replete with difficulties. The plaintiffs undertook to prove amongst other things, the state, 200 years ago, of two separate people who had different, wholly unwritten languages and cultures, who kept no records, and who lived in adjacent parts of a vast, remote and virtually inaccessible territory. They must also prove the then and continuing use by these peoples of the lands they claim (if such was the case), and they must do all this within the laws of evidence which apply in this province.

The plaintiffs began by describing the present social organization of the Gitksan and Wet'suwet'en which I have already briefly mentioned, and their attachment to the lands they claim. To this end they first called a number of senior chiefs, Mrs. MacKenzie, Mrs. Johnson and Mrs. Ryan, who are Gitksan, and then Alfred Joseph, Madeleine and Henry Alfred, Alfred Mitchell, Dan Michael, and Sarah Leighton who are Wet'suwet'en, and many others from both these peoples for the purpose of attempting to establish that their present society is a continuation of what has been in place for a long, long time. They also gave evidence about the boundaries of the territories they claim.

The plaintiffs also called many other interesting lay witnesses who described much of their oral history, customs and traditions some of which I have already described, and they also adduced a considerable body of scientific opinion evidence in many disciplines.

In a nutshell, they sought first to establish both the present social organization of the Gitksan and Wet'suwet'en; secondly, that it exists today in the same or nearly the same form as at the time of contact; thirdly, that at that time, and since, the plaintiffs have used and occupied all of these separate and remote territories for aboriginal purposes; and fourthly, because of the way the plaintiffs have framed their case, they undertook also to prove the boundaries of these 133 separate territories and the distinct use made of them by the plaintiffs and their ancestors.

Their history, either as peoples, or in smaller groups, is but a part of the plaintiffs' evidence burden, and in this section I shall endeavour to describe the kinds of evidence adduced by the plaintiffs. It is important to keep in mind that evidence may fail for one or more reasons to prove very much, but it may still contribute along with other evidence, to the proof of all or a part of the plaintiffs' case. I announced early in the trial, and frequently throughout its duration, that I would attempt to err, if at all, on the side of admissibility, rather than exclude anything that might be relevant.

It is not possible to consider the factual, cultural and scientific evidence separately, although I shall attempt for convenience to group it that way.

The role of history in this kind of case has been mentioned by the Supreme Court of Canada in a number of cases.

In **Kruger v. R.** 1 (1978) 1 S.C.R. 104 Dickson J . . . as he then was, said at p. 109:

> "Claims of aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue, and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis."

In **R. v. Simon,** (1985) 24 D.L.R. (4 th) 390 (S.C.C.) the same learned judge said that the oral history of a people based upon successive declarations of deceased persons may be given in evidence as a matter of admissibility, for it could not otherwise be proven.

In neither of these cases was the court dealing with a case that bears any resemblance to this one, but they provide useful indications of the approach which should be taken.

It is obvious that the basic facts of the plaintiff's histories cannot be proven through documents or by the personal knowledge of living witnesses. Accordingly, the plaintiffs found it necessary to prove parts of their case indirectly by a number of different means which necessarily involved the reputation exception to the hearsay rule of evidence.

## 2. Specific Kinds of Evidence

### (a) Hearsay, and Declarations by Deceased Persons

I have already mentioned the 3 judgments I delivered in this case during the course of this trial. I have now lived with this case for over 3 years, during which I have had to make a great many rulings on evidence. Those judgments and rulings were not seriously attacked during counsel's final arguments even though they had a great deal to say for and against the quality and effect of the evidence which was admitted under those rulings.

Starting at p. 341 of my first Reasons for Judgment, I dealt with evidence relating to English land title which I equate for the purpose of admissibility to the kind of claim the plaintiffs are making in this action. I concluded that out of court declarations relating to the ownership or use of land by living persons are not admissible, but declarations made by deceased persons in proper circumstances giving rise to a reputation of ownership or use could be admissible.

At p. 343 of my first reasons I said about reputation evidence:

> ". . . I mention this only to illustrate the difficulty of the matter and it may be that the only proper question to ask in chief about these matters is along the lines suggested by **Wigmore,** para 1584, 'What have you heard old men, now deceased, say as to the reputation on this subject." It is not of course necessary to use that precise language, as the law does not favour magic words, but it is important to remember that the question is not, 'What is the reputation in the community?' as such a

> reputation may not be based on grounds (declarations by deceased persons) which alone make the evidence admissible."

With respect, it now appears to me that this is impossible to apply strictly in the course of a long trial especially with witnesses who are giving evidence in their second language or through interpreters. Experience in many trials before and during this one has convinced me that witnesses do not respond easily to the concept of reputation evidence, and they have great difficulty accommodating themselves to it. This is most frequently noticed in character evidence in sentencing proceedings where counsel is required to ask questions in terms of reputation. Conventional wisdom leads most trial judges to accept the answer, even if it must be discounted appropriately, when the witness persists in giving specific examples of good character.

I have given this question much worried thought as it is impossible in the course of such a long trial to expect counsel to object every time a witness gives specific rather than general evidence from which a reputation may be inferred. In fact, Mr. Goldie made a blanket objection to all inadmissible hearsay of which there was, unfortunately, a great deal. It is also too much to expect the Court, after having made a ruling, constantly to interrupt the proper flow of the evidence to remind counsel of the obvious.

I have concluded with some hesitation that I should not disregard all the **viva voce** evidence which fails to comply strictly with the form of my reputation ruling, but in fairness I cannot amend the substantive requirements of the law.

While the foregoing applies generally to the plaintiffs' evidence regarding the ownership, occupation or use of land, it seems to me the same also applies to proof of genealogy which is also incapable of proof by personal knowledge. Again, properly discounted reputation evidence must be admitted for the plaintiffs could not otherwise embark upon the proof of their case.

As to historical facts, there was evidence of dramatic events such as the rock slide at Hagwilget Canyon, which I call general history, as well as personal history. By the latter I mean, for example, what the deceased grandparent of a witness said about his life, or the life of his grandparents or other identified elders in relation to a relevant fact such as the tradition or culture of a House or people or the use and occupation of land. These matters, it seems to me must, as a matter of necessity, be equivalent to a declaration of land use, and must be admissible under the rubric of reputation evidence, or discounted reputation evidence. This kind of evidence must, of course, be weighed and tested for trustworthiness.

In addition, an important distinction must be recognized between what a deceased elder said he or his elders did, and what they believed. Only the former can have value as evidence.

There is also a distinct difference between folklore ("antimahlaswx" in Gitksan), and their laws and traditions. Both are passed on orally from generation to generation, often it seems, by grandmothers who tell these things to their grandchildren often as "an everyday thing". This distinction was recognized by the witness Mary MacKenzie who is one of the plaintiffs' principal and most articulate and comprehensive witnesses. In my earlier ruling I attempted to draw a distinction between folklore and traditions, laws and histories. Of these, folklore is clearly not admissible as proof of the facts stated; the others may be admissible, subject to appropriate deductions for weight whenever they meet **Wigmore's** great tests of necessity and trustworthiness.

As I have said, it is difficult to treat different classes of evidence separately, as they often overlap. I shall, however group them into the three classifications which I have already mentioned, factual, cultural, and scientific.

### (b) Recollections of Aboriginal Life

The most that the lay witnesses could tell me on this question, either in the witness box or by territorial affidavits, related to the use of land by their families and others within their personal knowledge, and declarations of deceased persons. This evidence establishes, without question, that the plaintiff's immediate ancestors, for the past 100 years or so, having been using land in the territory for aboriginal purposes. Beyond that, notwithstanding almost by rote assurances that every ancestor spoke of unchanging generations of similar use, I am not persuaded the evidence is sufficiently precise and cogent, when weighed against the cautions of the anthropologists, to establish specific land use, as opposed to general land use, far enough back in time to permit the plaintiffs to succeed on issues such as internal boundaries.

In fact, some of this evidence had an decided complexion of unreality about it, as if nothing has changed since before contact. This affects the credibility of statements which were often repeated that ancestors had been using these specific lands from the beginning of time, or similar expression. Aboriginal life, in my view, was far from stable and it stretches credulity to believe that remote ancestors considered themselves bound to specific lands.

This has continued to the present. There is no doubt, as I have said, that many of the present male and female population trapped and hunted for economic reasons in their youth. However, most of them discontinued trapping years ago before or at the time the price of furs collapsed in the 1950's, and they have gradually moved into other segments of the cash economy even though the price of furs has recovered. There is very little, and decreasing, interest in pursuing these activities at the present time.

The evidence satisfies me that most Gitksan and Wet'suwet'en people do not now live an aboriginal life. They have been gradually moving away from it since contact, and there is practically no one trapping and hunting full time, although fishing has remained an important part of their culture and economy. As early as the 1850's the Gitksan, who had not previously seen a horse, quickly became adept at packing for the construction of the Collins Overland Telegraph, for the Yukon Telegraph, for the Omineca and Cassiar Gold Rushes, and for the construction of the Grand Trunk Pacific Railroad in the first decade of this century. At the same time the Indians increasingly participated in commercial fishing at the coast, and in the logging and lumbering industries which became the economic mainstays of the region.

Witness after witness admitted participation in the wage or cash economy. Art Matthews Jr., (Tenimyget) for example, is an enthusiastic, weekend aboriginal hunter. But at the time of trial, he was also the head saw filer at the Westar sawmill at Gitwangak where he had been steadily employed for 15 years, a graduate of the B.C. Institute of Technology, a shop steward, and a member of the Negotiating Committee of the Industrial Woodworkers of America. Pete Muldoe (Gitludahl) has followed a variety of non-aboriginal vocations including logging on the lands claimed by another chief; Joan Ryan (Hanamuxw) teaches school in Prince Rupert; and many, many Indians and chiefs have found seasonal or full-time employment in the forest products and coast commercial fishing industry although unemployment remains a serious problem for both these peoples.

Even in their aboriginal pursuits, however, the plaintiffs do not seem to consider themselves tied to particular territories. I need only mention witnesses such as Pete Muldoe, Stanley Williams and Alfred Mitchell who described hunting and trapping, when they were young, and more recently on many, many, different territories.

I conclude that the lay witnesses establish substantial land dependency when the present elders were young and that by that time families or Houses had established some traditional associations with preferred hunting and trapping areas probably with relation to traplines. It is reasonable to assume land dependence was even greater in more remote times. But such evidence does not establish the time depth or details with specific lands beyond contact. I have no doubt such dependence has been decreasing for many decades and there is an understandable confusion of belief and fact on this important issue.

### (c) Adaawk and Kungax

The witnesses say each Gitksan and Wet'suwet'en House has an "adaawk" or "kungax" which in a very general sense might be said to represent an unwritten collection of important history, legend, laws, rituals and traditions of a House including a description of its territories.

When asked to state the adaawk of her House of Gyolgyet Mrs. MacKenzie said that it contains a description of the territories of her house, but she added that Albert Tait, the late Delgamuukw, knows a lot about the adaawk of her House and I understood her to mean that he knew more about the boundaries of her House than she did. On the other hand, she seemed familiar with the history of her House. She related the legends of the warrior Suuwiigos who "hundreds or thousands of years ago" repelled an invasion or raid by the unfriendly Tsitsawit people from the north. From the legend of Suuwiigos the House of Gyolguyet obtained some of its crests such as the ram, the giant man in the trees, the half-grizzly, and the image of the people in trees reflecting on a lake.

Mrs. Johnson, another significant witness, did not have a clear understanding of the boundaries of her House, but she spoke comprehensively about its legends. When asked about the adaawk of her House of Antgulilibix she related several stories which I would have classified generally as mythology. These stories described supernatural grizzly bears, unseasonable snowstorms and the migration of her people in ancient times from Kitseguecla or Kitwanga to a clearing where there is now a vegetable farm near Kispiox, and eventually to the Gitksan village of Kispiox where several Gitksan Houses have been located for many years.

Many other Gitksan witnesses spoke of the adaawk of their Houses but in most cases the descriptions were extremely vague and lacking in the particularity which later appeared in the Territorial Affidavits. There were also major inconsistencies in their evidence which will be more particularly described later.

There was very little first hand evidence given at trial about the kungax of the Wet'suwet'en. Mr. Joseph described it as a song, or songs about trails between territories. It was briefly touched upon by Madeline Alfred who referred to one location where bears were snared "near Moricetown" but no other detail. In fact, there seemed to be some confusion about what a kungax really is. I gather it is a song associated with a dance or ceremony similar to the Gitksan nox nox performed only during headstone and pole raising ceremonies or feasts.

Other Wet'suwet'en witnesses such as Elsie Quaw and Florence Hall referred to the kungax during Commission or cross-examination evidence on Territorial Affidavits.

As I have said, unwritten oral history and traditions of a House, and the culture of a people are admissible out of necessity as exceptions to the Hearsay Rule because they cannot be proven in any other way. The plaintiffs assert that references to their territory in their adaawk are powerful evidence establishing occupation and use of land over many, many years. The weight to be given to this kind of evidence depends, of course, upon its trustworthiness. The plaintiffs argue that adaawk or kungax are particularly trustworthy because of their antiquity and because they are authenticated by public statement and restatement in accordance with the practice that what is stated at a feast must be challenged then and there, at once, or not at all.

The difficulty with this kind of evidence is the fact that the defendants, by cross-examination, have raised serious questions about many of the basics tenants of Gitksan and Wet'suwet'en life and history and about the authenticity of the adaawk and kungax. In fact, as the trial progressed I noticed the plaintiffs seemed to place less and less importance on adaawk and kungax, possibly because they are highly equivocal, or perhaps because the plaintiffs focused more on feasting and scientific evidence.

Except in a very few cases, the totality of the evidence raises serious doubts about the reliability of the adaawk and kungax as evidence of detailed history, or land ownership, use or occupation. I say this reluctantly, without intending any affront to the beliefs of these peoples, but I am reminded by many learned authors to be cautious. Trigger warns that tribal societies have little interest in conserving an accurate knowledge of the past over long periods of time. Drs. Bishop and Ray, historical geographers, said in Ex. 1076:

> "Even when employed carefully, memory ethnography can only provide totally accurate information for relatively short time spans, usually one hundred years at the very most."

Admissibility and weight of evidence are two completely different concepts. While I have not been troubled by the former, the doubts I have about the latter preclude me from treating the adaawk and kungax as direct evidence of facts in issue in this case except in a few cases where they could constitute confirmatory proof of early presence in the territory. My reasons are principally threefold.

First, I am far from satisfied that there is any consistent practice among the Gitksan and Wet'suwet'en Houses about these matters. The early witnesses suggested that the adaawk are well formulated and the contents constantly sifted and verified. I am not persuaded that this is so. There is evidence that an adaawk is seldom told at feasts; that some Chiefs never tell their adaawk; that some Chiefs never tell them outside their Houses; that there is little likelihood of dissent; and that the verifying group is so small that they cannot safely be regarded as expressing the reputation of even the indian community, let alone the larger community whose opportunity to dispute territorial claims would be essential to weight.

Secondly, the adaawk are seriously lacking in detail about the specific lands to which they are said to relate. In this case, as I shall have occasion to mention again, the plaintiffs are seeking exclusive rights to specific lands. Specificity far in excess of what the adaawk provide would be required to support an interest in land. Many adaawk and kungax could relate to any number of locations.

Thirdly, the plaintiffs sought to authenticate their adaawk by reference to the work of authors such as Will Robinson's **Men of Medeek** (as told by Walter Wright), Parts I and II, and several works of the noted anthropologist **Marius Barbeau** including **Temlarh'am: The Land of Plenty of the North Pacific Coast** and **Raven-Clan Outlaws on the North Pacific Coast**, and **The Gwenhoot of Alaska: In Search of a Bounteous Land.** Many of these adaawk do not relate to the territory but they demonstrate the weakness of this kind of evidence.

These adaawk are sprinkled with historical references making them suspect as trustworthy evidence of pre-contact history. They refer to such matters as guns, moose, The Hudson's Bay Company and other historic items. Rather than quote from these references I have added as Schedule "3" a critique prepared by counsel for the province and included in their Outline of Argument. Many of these adaawk relate to areas and people from outside the territory but they are a part of a body of evidence upon which the plaintiffs rely. These collections demonstrate to my satisfaction that many adaawk are of dubious value as detailed proof of specific events (or locations) which are believed to have occurred before contact. The same applies to the kungax of the Wet'suwet'en.

This in no way reflects upon adaawk and kungax for the spiritual use or value they have to Gitksan and Wet'suwet'en people. I do not purport to pass on that question in any way. All I say is that I do not find them helpful as evidence of use of specific territories at particular times in the past, Fortunately, as will be seen, it is not necessary to rely upon adaawk and kungax in order to find that some ancestors of some of the plaintiffs have been present in the territory for a very long time.

### (d) Archaeological Evidence

The plaintiffs also rely upon archaeological evidence to establish their long time occupation of the territory. I do not find it necessary to describe this evidence in detail as it can conveniently be summarized.

There is no doubt, in my view, that there has been human habitation at locations on the lower and middle Skeena River region extending at least from Prince Rupert harbour in the west to Hagwilget canyon, and at Moricetown, for at least 3,000 years or more. This has been established by the findings and conclusions of several reputable archaeologists. Ms. Albright, an archaeologist employed by the plaintiffs also described mostly undated findings at Gitanka'at, Hagwilget, Moricetown, Kisgegas and Gitangasx, but they consist largely of cache pits and house remains some of which are just as likely of historic rather than pre or proto-historic origin. There is also the great fortress, Ta'otsip, at Kitwangak about a mile from the Skeena. Its location and fairly recent dating (1700's) adds little to what seems already recognized.

The difficulty from the plaintiffs' point of view, is that none of this evidence, except the Seeley Lake event which I shall describe in a moment, relates distinctively to the plaintiffs. Any aboriginal people could have created these remains. One of the notable gaps in the plaintiffs' case is the absence of any significant archaeological findings at the believed sites of either Temlaxam, or Dizkle which the Gitksan and Wet'suwet'en respectively believe were the sites of their most important ancestral villages and which are frequently mentioned in adaawk and kungax.

In fact, there is no evidence of any archaeological findings away from the Skeena anywhere in the Gitksan area except at Hagwilget which is on the Bulkley River just a few miles from its confluence with the Skeena. The only findings in Wet'suwet'en country are at Moricetown which is situated on the Bulkley River.

Sprinkled throughout the evidence are indications that there has been considerable mobility among all the aboriginal peoples of the north-west, and, of course, the Wet'suwet'en are almost indistinguishable from the Babine. The archaeological and anthropological evidence confirms this. For example, the archaeologist Dr. George MacDonald, after considering the archaeological evidence at locations such as Prince Rupert Harbour, Kitselas Canyon, Kitwanga and Hagwilget, concluded in his **Epic of Necht,** (Ex. 847, Tab 19 pp. 79-80) that a period of relative stability prevailed on the north-west coast and interior from the first millennia B.C. which lasted until the early 1700's. Dr. MacDonald says: "By that time there is evidence for a widespread destabilization of populations throughout much of the north-west coast." He goes on to describe how warfare became common, resulting in part from the desire of some tribes, particularly the

Haida and Tsimshian, to control the spread of the new trade goods that were starting to "filter through from Siberia."

Warfare was by no means confined to the coast. MacDonald mentions a struggle to control trade between the Chilcotin and the Carrier, and trader Brown mentions a Carrier raid as far east as Fort George in the 1820's.

With warfare came slavery and continued dislocation during which trade ties were developed, often with the Gitksan acting as middle persons between the aggressive Tsimshian who had the easiest access to trade goods at the coast. It seems common ground that Tsimshian traders continued to be a significant force in the lower and middle Skeena well into the middle of the last century. Reputable scholars such as Dyen and Aberle have concluded in **Lexical Reconstruction: The case of the Proto-Athapaskan Kinship System:**

> "Such an impact from the Northwest Coast could have resulted from trading relationships and inter-marriage predating the fur trade, but the relative recency of these innovations may indicate that the impact of the Northwest Coast was more recent and resulted from the fur trade, which impelled the Northwest Coast tribes to strengthen ties with the interior and in some instances to expand into the interior."

There is other evidence. For example, it was reported in historic times that a majority of the inhabitants of the Gitksan village of Gitseguecla were Wet'suwet'en, and there are Babine and Cheslatta Indian Reserves within the territory claimed by the Wet'suwet'en.

There is convincing evidence of a not very gradual movement of aboriginal people out of the distant parts of the territory towards the larger villages in the main river corridors. I have already mentioned Mrs. MacKenzie, who said the history of her House, as it was taught to her by her ancestors, was that they originally lived at the "wild rice" village of Gitangasx on the upper Skeena which is now deserted, and that they migrated "hundreds or thousands of years ago" to Kuldo on the middle Skeena (also now deserted) and then, many, many years ago they moved further south to Kispiox.

Loring, the Indian Agent at Hazelton from 1890 to 1920, reported in 1890 that Ksun, about 30 miles up river from Hazelton, was the principal fishing village of the Gitksan on the Skeena yet Ksun was not even mentioned as a village site in the plaintiffs evidence.

There is also evidence of movement of Gitksan persons to live with the Nishga on the Nass, and I have no doubt this kind of migration was in both directions.

More significantly, independent archaeological evidence suggests the Hagwilget Canyon site, in Gitksan country, has a curious history. Dr. Kenneth Ames identified 3 different archaeological zones. The first indicates relatively intense use for a period ending between 4,000 and 3500 B.P.; the second zone indicates light and sporadic use probably limited to fishing which continued until 1820 A.D. when, Dr. Ames says:

> ". . . the locality was given or loaned by the Gitksan to the Carrier, (as the Wet'suwet'en were still called when Ames wrote in the 1970's). The site has been used since as a village and most recently as a fishing locality by the Hagwilget Carrier."

The reason for this was that in 1820 a rock slide (Rocher de Boule) in the Hagwilget Canyon blocked access of spawning salmon into the Bulkley River depriving the "Carrier" Indians at Moricetown of their usual source of food. As a consequence they were invited or permitted by the Gitksan to occupy the canyon site at Hagwilget, only few miles from the forks with the Skeena and it has remained a Wet'suwet'en village ever since.

In my view, the archaeological evidence establishes early human habitation at some of these sites, but not necessarily occupation by Gitksan or Wet'suwet'en ancestors of the plaintiffs. It is highly significant that there is no physical evidence supporting the plaintiffs claims at other than a few Skeena village sites and at Hagwilget and Moricetown Canyons. Moreover, much of this evidence is highly equivocal with findings of white man's garbage mixed with possible archaeological features, and similar findings of both kinds have been found at many locations throughout the region outside the territory.

The archaeological evidence is helpful to the plaintiffs because it establishes human habitation at a few locations along the Skeena and at two locations on the Bulkley for a long, long time before the date of contact. However, such evidence is not directly connected to the ancestors of the plaintiffs. The absence of any significant archaeological findings at the supposed sites of Temlaxam and Dizkle casts doubt upon the authenticity of some of the adaawk and kungax, and upon the migration theory of Ms. Marsden which I shall discuss shortly.

### (e) The Seeley Lake Medeek

In some of the Gitksan adaawk there are accounts of a supernatural event which is said to have occurred at Seeley Lake, which is on the highway side of the Skeena River a few kilometres down river from present day Hazelton, and about 2 kilometres from the river. This lake is across the Skeena from one of the suggested sites of the unproven ancestral Gitksan village of Temlaxam.

This event was described by the witness Mary Johnson during her evidence about the adaawk of her house. This is what Mrs. Johnson said at trial.

> "A: After all the fishing is finished and all the hunting for — for mountain goats and groundhogs and the mountain and all the berry picking is finished, then they got nothing to do, so the maidens would go and make the camp at the lake, at the foot of Stekyooden, and they caught some grouse.
>
> THE COURT: At the foot of which?
>
> MR. GRANT: Stekyooden, number 29 on the list, My Lord, the list provided today.
>
> THE COURT: Yes.
>
> MR. GRANT:
> Q And I don't know if — I was watching the reporter but the word she said was "maidens". I don't know if you caught that, it wasn't a Gitksan. You were saying the foot of Stekyooden?
>
> A They — as they were caught — after they were caught many trouts, they cut out the back bone of the skin, and tails are still on the back bone. And as they was staying there, they learned the dances of the people and all the songs, and the way they were — they move when they were dancing. So one time, one young lady cut one of these back bone and put it on her head as a decoration while dancing. And she would happen to be near the — near the lake, and she look at herself at the edge of the lake, and she saw it was the bone looks really, really beautiful and why she dances gracefully. So she ran and told the others what she have found, and show them. Then they all got back bones and decorated their heads with it and some of the people used to come over and watch them and they didn't put a stop to it, and they smiled at

what's going on. So after they all went home when it's time to go home, the people of T'am Lax amit heard a terrible noise, and they —

Q Can I stop you a moment. You said they went home?

A Yeah.

Mary Johnson (for Plaintiffs) In chief by Mr. Grant

Q Is that — they returned from the lake to T'am Lax amit?

A Yeah. They left the lake and the people watched where the noise comes from, and they've seen some great big trees were throwing about the top of the rest of the tall trees, and they just stood there wondering what happened, until it comes — there is a little stream that runs from the lake and goes into the Skeena River, and that's — and this thing followed the little stream, tramping down the trees. And finally they see this great huge bear, grizzly bear that they have never seen before. And the chiefs sent messengers through the village to — after warriors, to have the warriors ready, which they did. And not long after the messenger went out, all the warriors came out with their spears and arrows and bow and arrow, and hammers that are made with stone, all those from weapons that strong young men use, they all come out bravely to meet this great grizzly bear. And he gets to the water and swam across and — and they went in front, they all went in front of him, but he is — he is a supernatural grizzly bear, they call him Mediik, and whenever they are shot him with an arrow, the arrow flies way up high instead and fall back down again and it hit the warriors, and they were wounded. And this grizzly bear tramped them until they were crushed to the ground, and goes through the village and kills a lot of people. And after that he — he came — he turned and go into the water again, follow the stream where he came from the first place. So the brave warriors went to — to see where he went, and it goes into the lake, disappeared into the lake. That's why the wise elders told the young people not to play around with fish or meat or anything, because the — because the Sun God gave them food to eat and those who — just they should just take enough to eat and not to play with it, that's why this tragedy happens to them.

Q Did any of the people go back up the trail that this grizzly bear followed down the mountain afterwards?

A Yeah. They went — they went to follow the trail and that's when they see that he disappeared, his track disappeared into the lake. So they believed that it's the revenge of those trouts, because they played around with their bones.

Q And is that lake — do you know what that lake is known to the non-Indian today, the name of that lake?

A They call it see Seeley Lake.

This event, without reference to the fight with the giant bear, is also described in Walter Wright's **Men of Medeek,** which is a collection of oral histories. In this collection is also found the adaawk of Izaac Tens (Nikadeen) where the lake is said to rise, and he also describes the slaying of the Medeek in the lake.

The plaintiffs' position is that the adaawk and other historical references to this grizzly bear event is in part an oral historical description of the great Seeley Lake slide. A part of this slide is scientifically dated at around 3500 years ago, so the plaintiffs say Gitksan persons must have been in the area at that time.

With a view to establishing a scientific explanation for this legend consistent with the ancient presence of Gitksan people in the region of Temlaxam and its environs, the plaintiffs engaged Dr. Allen S. Gottesfeld and Dr. Rolf Mathewes. Dr. Gottesfeld is learned in geomorphology which is the study of existing land forms and the processes that cause them. Dr. Mathewes is learned in palaeobotany and in particular pollen analysis and environment reconstruction.

It will be convenient to describe Dr. Gottesfeld's evidence first. He studied the landslides in the Chicago Creek basin which drains Seeley Lake into the Skeena.

Dr. Gottesfeld explained that all of British Columbia was covered by ice during the last Ice Age but beyond its margins somewhere in the State of Washington the soils are much deeper and more developed. They have redder colours and the breakdown of rock is much greater, leading to the conclusion that there has been a lot more time for soil development processes to occur south of the glaciers. Relative soil development has become a standard technique for describing the sequence of glacial deposits in North America. With younger deposits in areas undisturbed since the last Ice Age (about 10,000-11,000 years ago), one finds less soil development. Deposits which have intermediate levels of soil development show signs of incipient soil development, slight reddening, and breakdown of feldspar materials to clay and textural changes suggesting intermediate development. Deposits found in the Hazelton area formed in the last 100 or 200 years have essentially no soil development.

Radiocarbon dating is a technique which produces absolute dates but it requires the collection of organic material like pieces of wood, peat, pollen or other material. Such samples are often difficult to find.

Following three days of fieldwork in July 1985, Dr. Gottesfeld furnished a draft report and then entered into a contract with the plaintiffs which included a specific assignment to:

> "a) conduct geological fieldwork and review published data on the post-glacial deposits of Stekyooden between Mudflat Creek and Carnaby that will;
>
> (i) confirm the Carnaby and Chicago Creek slides correlate with the Adaawk descriptions supplied to you with respect to type of event, size of event and the blocking of the Seeley Lake outflow . . .
>
> ii) date the above noted events by identifying major slide deposits and obtaining and testing suitable carbon samples . . ."

Dr. Gottesfeld said he was asked to correlate these slide areas with the Adaawk descriptions he had been given.

After entering into his consulting contract, Dr. Gottesfeld undertook intensive fieldwork in the Chicago Creek slide areas, dug some test holes and looked for samples suitable for carbon dating.

He identified the Chicago Creek landslide areas as a debris torrent or avalanche which is one which occurs outside stream channels and accordingly tends to cover greater land surface areas. He identified two slide areas, one in the Chicago Creek basin and one just to the east, the latter being a very active slide area, the age of which was not determined because recent slides in the last decade or two cover older parts of it.

The second debris fan originates in a contour valley just east of Chicago Creek but spreads both east and west as it moved north and its western extremity impinged on Chicago Creek. All is shown in Figure 2 of Dr. Gottesfeld's report (Exhibit 785).

Dr. Gottesfeld said that the bulk of that slide is active and has a 20th century age. Sticking out from under the edges of this modern debris fan are lobes of older material which, when examined and dated by soil development, indicate they were formed at the end of the Ice Age about 10,000 years ago. On the westerly edge there appears to be a mid-holocene deposit. This lobe appears to dam the Seeley Lake outfall.

He says this debris (mid-holocene) was formed from 3,000 to 6,000 or perhaps 8,000 years ago.

From test hole 13, which is shown on Figure 11 to be on the northeast edge of the Chicago slide area, samples showed an age of 1930 plus or minus 80 years B.P. From test hole 14, samples yielded a date of 3580 plus or minus 150 B.P.

Dr. Gottesfeld rationalized the discrepancy between the two dates by reference to the different composition of the areas in which they were found. His conclusion is that the date of the westerly edge of the slide in the Seeley Lake marsh area is more accurate and "... 3580 dates a time within a few years of the appearance of the landslide ...,"

He said that although a large part of the westerly edge is covered by newer slides, the underlying 3580 year feature is the largest geomorphological event in the area.

From this basis Dr. Gottesfeld concluded that this debris lobe diverted Chicago Creek and dammed the outlet of Seeley Lake.

In his evidence he said that when this event occurred:

> "... there would be a tremendous noise, overwhelming loud noise, a great cloud of material, swaths of forests being cleared as the debris slide came down across the Chicago Creek fan ... I envisaged the debris tarring where lots of water was incorporated and debris and there would be this great mud-charged mess of material coming down the valley, a great rolled wall of brown material, trees tossed around, just a swath of countryside being cleared that would come towards you, I am sure you would be frightened and run away ..."

I agree with his last statement.

Dr. Rolf Mathewes was qualified as an expert in the field of palaeobotany and in particular pollen analysis and environmental reconstruction. "Paleo", as everyone knows, refers to the past. A subdiscipline of palaeobotany is palynology which specifically refers to the study of microscopic pollen grains and spores which are the most abundant fossil remains and are widely used in paleoenvironmental reconstruction, particularly in the last few million years. It is sometimes called pollen analysis.

Dr. Mathewes took 4½ metres of 4.5 cm. diameter core from the bed of Seeley Lake. This shows a layer of clay about 1½ metres below the lake bed. This clay band is shown in the photographs shown as Figure 5 in Dr. Mathewes' report (Exhibit 780). At vol. 143-9078 Dr. Mathewes gave the following evidence:

> "Q: And when you saw that clay band that's indicated there, what did that band indicate to you?

> A: Well, such bands do occur in lake sediments and they usually indicate some form of disturbance. It's a — usually an inwashing of mineral matter. The lighter colour is due to portions of silt and clay which are lighter in colour than the dark organic residues. Therefore this suggested input of mineral matter would suggest some sort of disturbance in the immediate watershed. That's reflected in the bottom sediments accumulating on the lake."

With carbon dating of macrofossil and pollen analysis of samples taken on either side of the clay band, Dr. Mathewes established the sample to be 3380 plus or minus 90 years B.P. A deeper clay band was found to be 6330 plus or minus 160 years B.P. while deeper gravel deposits were found to be 9230 plus or minus 130 B.P. At 143-9081 Dr. Mathewes said:

> ". . . There are a number of possibilities for such clay bands in the lake, but looking at all the evidence that I could find, I would feel very strongly that this clay band was formed by a sudden rise in water level at the time of around 3380 years ago, which caused mineral matter to be washed into the lake and deposited as part of [the first clay band]."

Dr. Mathewes also described a very abrupt increase in the number of seeds and pollen above the clay band. Right above the clay band is the largest collection of birch seeds in the whole core with the exception of the early stages around 9,000 years ago. This heavy concentration of birch seeds found right on top of the clay band is from trees that would be expected to grow around the lakeshore. This influx of seeds was suggested by Dr. Matthews to be caused by rising water levels which washed these seeds from the forest floor and deposited them in the lake.

In addition, he found no macrofossil remains of the water plant, ceratophylium (coon tails), below the clay band but a huge concentration of this plant remains immediately above the clay band. This suggested to Dr. Matthews that something was bringing a lot of plant debris and detritus into the lake and such plant remains eventually settled on the bottom. He says this is consistent with a landslide disturbance of the water.

Dr. Matthews considered and discarded alternative causes other than the landslide blockage of the stream outlet as possible causes for the clay band found beneath Seeley Lake. These included fire, storms and the activities of beavers. He eliminated fire because of the lack of any increase in carbon content in the samples taken throughout the depth of the core. Similarly, he found no reason to think there was any relationship between the older clay layer and the newer one.

There are numerous difficulties with this, not the least of which are that there is no evidence of a village at Temlaxam; that there have been many major slides in the vicinity of Seeley Lake, some in the historic era; and it is difficult to equate a massive land slide to a grizzly bear. On the other hand, the appearance of a bear in the course of such a slide may be understandable **post hoc** reasoning which does not affect the dating of the event.

I do not doubt a gigantic slide caused a blockage of Chicago Creek 3500 years ago, but the portion of the slide identified by the scientists to be of that date is only a portion of the many slides in the area, and I am troubled that its intersection with the course of Chicago Creek may be well below the level of the lake. If this were so, it would have been unlikely to raise the level of the lake because backed up water would probably have found another downhill course to the river.

The evidence on this question is uncertain. I rather thought, when listening to the evidence of Dr. Gottesfeld, that he was describing an intersection at an elevation lower than Seeley Lake, and I think his report suggests this. At the end of his evidence, however, I asked these questions:

> Q And is it your evidence that the slide caused a damming or backing up Chicago Creek and that in some way brought the clay deposit to the underbed of Seeley lake?
>
> A I think it's very likely. As I read Dr. Matthews' report the lithology of his clay pan one match the lithology of the clay deposit that I dated from among the boulders at the edge of the Seeley swamp. I think it is the same layer.
>
> Q What is the mechanism that causes — that explains the presence of clay pan from damming of the creek and the possible raising of the water level?
>
> A Well, what I would imagine happened was there was this great bulge, this big massive deposit came in and filled the valley, that Chicago Creek was then running all over the deposit, or quite disorganized fashion across the top of the deposit, numerous channels washing out the fine crushed rock material from among the boulders and making the lake white with white ground up granite material that came from the debris — from the debris flow and placement, and then that clay and silt would be distributed throughout the lake and gradually settle down and be incorporated in sediments throughout the lake.

I cannot believe such an eminent scientist would have given that evidence if there was such a basic flaw in his theory. I therefore conclude that the slide probably did cause the level of the lake to rise as postulated.

The plaintiffs say this adaawk describes a land slide actually experienced by Indian persons who have preserved it orally as part of their history. On this basis they ask me to infer that Gitksan persons have been in the area of Chicago Creek since at least the time of the slide.

The Medeek or supernatural portion of these adaawk is a matter of belief, or faith, rather than rational inference. That portion of the adaawk is not necessary for the purposes for which the adaawk is tendered in evidence. Assuming these adaawk describe a landslide, I believe it could be reasonable to regard them as confirmatory of other evidence of aboriginal presence in the area at that time.

If these adaawk stood alone, I could not infer much more than human presence. Particularly, I could not conclude those present at the time of this event were necessarily ancestors of any of the plaintiffs. It is just as probable, in my view, that the story rather than the ancestors remained in (or returned to) the area. This demonstrates the difficulty of inferring details from such a generalized account.

If supported by other facts, and subject to the assumption just mentioned, I would not exclude these adaawk as evidence confirming early Gitksan and Wet'suwet'en presence in the area which was, incidentally, immediately adjacent to the Skeena River just a few miles west or south of the forks of the Skeena and Bulkley Rivers. As it turns out, however, I am able to infer Gitksan and Wet'suwet'en presence in that general area for the required time-depth on other evidence, particularly archaeology, linguistics and genealogy without having to decide whether these adaawk actually describe a land slide.

In the result, I do not reject the possible connection between the landslide and Gitksan presence, but I do not find it necessary to rely upon it.

### (f) Genealogical Evidence (Ms. Harris)

Ms. Harris is a Gitksan person by adoption with a chief's name. She has done graduate student work towards her Master's degree in anthropology, but she has not written her thesis. She has undertaken the enormous task of constructing genealogical charts for the Gitksan Houses.

Ms. Harris is not really qualified for this project. She admits she did not follow research guidelines which have been established for this kind of work, she did not submit her work to adequate testing or scrutiny, and she is, of course, a plaintiff interested in the outcome of the very litigation for which this work was done. It would have been better if this work had been done by a disinterested person, but considering the only data sources were other Gitksan persons, it may also be the case that an outsider would not have received the cooperation which was so essential to the project.

There are obvious difficulties with this evidence, which, even when confirmed by witnesses, is in one sense just a collection of hearsay statements organized by Ms. Harris to demonstrate matrilinear organization of Houses. No verification of her conclusions is possible because there are no records. Even headstones do not disclose House membership. The reputation upon which she relies, if any, is limited to the Gitksan community which has an obvious interest in the outcome of the case for which these charts were prepared. Also, the genealogical charts furnish very little evidence about Gitksan populations or organization beyond the late years of the last century. In addition, it is generally held to be difficult, even with records, to have much understanding beyond 3 generations.

Notwithstanding the above, and many admitted errors and inconsistencies, I have a favourable impression of the competence and industry of Ms. Harris, and there is no reason why I should not accept her charts as generally reliable evidence of genealogy from which House membership may be inferred even though Houses are rarely mentioned in writings about her people.

Doing the only thing that could be done, that is talk to elders who alone have the information required for the formation of charts, Ms. Harris has done her best to furnish a workable understanding of the family lineages she was investigating. The only general discount I would apply to her work relates to the reliability of her informants, particularly those who spoke beyond the 3 generations or the one hundred years mentioned above.

I was not nearly so impressed with the Wet'suwet'en genealogical charts, as they were prepared piecemeal. The original research was started by Ms. Harris, but she then concentrated on Gitksan genealogies and her files were turned over to Dr. Antonia Mills who is an anthropologist retained by the plaintiffs in this case. Dr. Mills has no qualifications in this specialized kind of work and she left before the genealogy project was completed. The Wet'suwet'en charts were actually prepared by Mr. Victor Jim who also has no qualifications in this area. It was finally left to Ms. Wilson-Kenni, a Gitksan person employed by a Wet'suwet'en Band Council, to adduce these charts in evidence.

Again, the Wet'suwet'en charts do not explain or demonstrate social organization.

Notwithstanding all these difficulties, I have the view that most of these charts are fair indicators of the various lineages, and I believe some of them are generally reliable for 3 or 4 generations. They are, however, one dimensional, in that they only disclose kinship. Matrilinear organization upon which House membership depends has been imposed arbitrarily on these charts.

Although I have no doubt their charts contain much useful information, particularly those which have been confirmed by witnesses, they are largely hearsay sometimes lacking the verification of a reliable, qualified opinion. They do not establish House membership as an active force in the lives of the persons listed. Again, in the view I have of this case, it does not matter if they are strictly correct, although I think most of them are probably accurate.

### (g) Ms. Marsden's Evidence (Origins and Migrations)

Ms. Marsden holds a minor chief's name in a Gitksan House consequent upon her adoption into a House. She has a Bachelors degree in Anthropology but no other academic qualifications. She has undertaken a study of the adaawk of the Gitksan including that of the grizzly bear I have already mentioned. From these sources she has constructed a theory of Gitksan origins and migrations in which she dates many events described in the oral histories and ties them into locations such as the legendary village of Temlaxam which is featured extensively in her theory.

In fact, it appears to me that the existence of Temlaxam is central to her theory, and, as I have said, there is no objective evidence it ever existed.

Ms. Marsden does not say that each adaawk is literally correct, and she acknowledges that many of the events which they describe are in the historic period, but her fundamental proposition is that some Gitksan histories can be dated back to 10,000 years ago even though they include many obviously historical events.

I am unable to accept Ms. Marsden theory. I have no doubt it is put forward honestly and in good faith, but her qualifications are not adequate for such a study, it has not been published or subjected to academic or other learned scrutiny, she is an interested party, and she has ignored some verified facts and other learned opinions such as those of Drs. Kari and Gottesfeld because they "they do not fit her chronology."

### (h) Linguistic Evidence (Dr. Rigsby and Dr. Kari)

As mentioned earlier the Gitksan and Wet'suwet'en speak Tsimshian and Athabaskan languages or dialects respectively. By a mysterious process only properly understood by very learned persons, it is possible to make estimates of when the speakers of a particular dialect "separated" from speakers of other dialects. The plaintiffs adduced the evidence of Drs. Rigsby and Kari who have studied this question.

Drs. Kari and Rigsby are specialists in languages each having a Doctorate in that discipline. Both were born in the United States and each has studied and worked in various languages and locations. Dr. Rigsby is now employed at the University of Queensland, Australia, while his former pupil, Dr. Kari, is at the University of Fairbanks in Alaska.

They collaborated on a joint report which is Exhibit 877. It comprises 80 pages including a bibliography and there are numerous appendices. They purport to have jointly written a short introduction but cross-examination established that it was partly authored by the plaintiffs' evidence coordinator. There is a section on linguistic methods which was apparently written by Dr. Rigsby who also furnished a major report on Gitksan Linguistic Relations while Dr. Kari wrote sections on Wet'suwet'en Linguistic Relations. A final section on the relationship of Gitksan and Wet'suwet'en languages was jointly prepared.

Dr. Rigsby's portion of the report was filed as evidence and the defendants did not require him to be cross-examined. Dr. Kari was extensively cross-examined.

The introduction to the report is relatively innocuous. Because of doubts I have about who wrote it, I do not propose to consider it. While the discovery of an intrusion into the authorship of this report was embarrassing, and produced some mild drama at trial, I was agreeably satisfied with the explanation offered by Dr. Kari who did not seek to refute the obvious. I do not think this minor contretemp affects the balance of the report.

Generally speaking, Dr. Rigsby says the Gitksan have a distinctive language which is generically within a group of languages called Tsimshian which is spoken on the north-west coast around Prince Rupert and in the lower Nass and Skeena Valleys. Each of these three species or dialects of Tsimshian, and a newly discovered South Tsimshian, is a distinctively different but related language.

Early linguists such as Boaz (1888) and Dorsey (1897) regarded Nishga as the oldest and purest dialect of which Gitksan was a part, and Tsimshian was regarded as a different dialect.

In fact, Gitksan and Nishga people understand each other readily but they do not immediately understand Coast Tsimshian although they are quite easily able to learn and understand it. Coast Tsimshian speakers are able to understand Nishga more easily than Gitksan.

South Tsimshian is a recently discovered dialect which is spoken in the vicinity of Hartley Bay and also at Metlakatla. It is related to, but different from, Coast Tsimshian.

Dr. Rigsby believes Gitksan and Nishga languages are more closely related to each other than either is related to Coast Tsimshian or South Tsimshian. Thus, he says, they are descended from a common ancestral language which he calls Proto-Interior Tsimshian. He thinks Gitksan and Nishga are sister languages and that they may be said to be cousin languages to Coast and Southern Tsimshian.

On the Swadish 100 Word Basic Test, Gitksan and Nishga share a remarkably high number of 97 items, but are lower rated in non-basic or "cultural" vocabulary. This test permits an estimate to be made for the likely date of separation which suggests a 100 year likelihood between Nisgha and Gitksan against a likely 500 to 2000 years for Coast and Southern Tsimshian. Partly for geographic reasons, Coast Tsimshian was probably the **lingua franca** of the north-west coast region.

Dr. Rigsby believes "... the linguistic ancestors of the Tsimshianic speaking people lived in the lower and middle Skeena Valley and probably also in the inlets and islands along the coast." These languages are said to contain a marine influence, and thus are not the languages of recent migrants from the interior as Boaz has suggested. The recent discovery of South Tsimshian supports the belief that the ancestral Tsimshian had a more southerly sociocultural orientation prior to more recent interaction with Haida and Tlingit.

Dr. Rigsby says in his Report at pp.40-41:

> "Within the Tsimshianic language family, we believe that the split between Interior Tsimshianic (Gitksan and Nishga), Coast Tsimshian and Southern Tsimshian may relate to the natural boundary of the canyon of the Skeena River at Kitselas. The time depth involved in the split between the two Interior Tsimshian languages and Coast Tsimshian is certainly greater than five hundred years, but given that there was continuing and regular interaction among the speakers of the several languages over time, it could go back more than two millennia. However, I hasten to say that this is strictly an estimate, based on my knowledge of change in other language families. It does, of course, predate the divergence of Gitksan and Nishga, whenever that might have occurred. And geographically, we may be reasonably sure that as the Proto-Tsimshian speech community broke up, the linguistic

> ancestors of the Southern Tsimshian were at the southern end of its territory, while those of the Proto-Interior Tsimshian were near its northern extreme.
>
> The latter split between Gitksan and Nishga, on the other hand, resulted from a movement overland out of the Middle Skeena Valley and intrusion into the Nass Valley by the linguistic ancestors of the Nishga. The Nishga then absorbed the Tlingit as they moved into the Nass Estuary, as well as some Athapaskan groups in the uplands. The rich Nass Estuary remained a disputed area between the Nisgha and the Coast Tsimshian into recent times."

Dr. Rigsby postulates that after separation from Coast Tsimshian, the Gitksan language of the Middle Skeena, east or north of Kitselas Canyon, began to be used further up the river borrowing Athabaskan words particularly for interior characteristics such as "moose" and other animals not found on the coasts.

There is also a difference between the western Gitksan dialect spoken in the western villages of Gitwangaak, Kitwancool and Kitseguecla and that spoken in the upper Skeena villages of Gitenmaax, Glen Vowell, Kispiox or the even the more distant locations such as Kitgegas, Kuldo and Bear Lake, with the principle differences being phonological.

I turn now to the portion of the report written by Dr. Kari regarding the language of the Wet'suwet'en.

Dr. Kari says that there are about forty closely related Athabaskan (or Dene) languages spoken in northern and western North America. It is found in three main regions: Central Alaska and north and north-west Canada; the pacific coasts of Oregon and California (now almost extinct) and south-west United States formerly extending into northern Mexico (Navaho). The language is sometimes called Na-Dene.

No one knows with certainty where the Athabaskan language originated, but Dr. Kari posits a disbursal probably from an ice-free refugium in the vicinity of the Yukon-Alaska border as that is the point of deepest divergence within the language family. He agrees with Sapri (1921) who describes a clearly unified group of languages over a widespread area, indicating separation not too long ago because of the striking homogeneity of the modern languages.

Dr. Kari estimates a proto-Athabaskan language immediately ancestral to the modern languages was spoken as recently as 200-225 years ago, but he admits this is a sophisticated estimate lacking the certainty of carbon dating. In fact, his estimate is based largely on the comparisons with language diffusions in Europe, which is a doubtful basis for such an estimate.

Father Morice, who resided at Stewart Lake from 1885 to 1904, was uncertain about the language of the people living in the Bulkley and Babine drainage areas. They were regarded generally as Carrier or Western Carrier, but Morice recognized their distinctiveness in his 1892-93 writings. He identified subdivisions within the general classification of "Babines" particularly the 310 souls inhabiting the north half of Babine Lake in three villages and the Hwotsu'tinni (Wetsoo Wet-een, or "people of the river Hwotsutan" (Bulkley)) living in two villages, Tse-teah "down against the rock" (probably Hagwilget) and Keyyarhwotgag ("old village") and two smaller places "now organizing" (Tse-'Kaz-Kwoh,) and Moricetown on the Bulkley all of which were on the Telegraph

Trail. Morice said this group numbered about 300 some of whom were related by blood to their neighbours the Gitksan. Morice added this:

> "The language of these different branches of the Carrier tribe, while remaining essentially the same, undergoes however marked variations corresponding to its ethnographical subdivisions. Upon that ground I have even sometimes asked myself whether distinct individuality as a tribe should not be granted to the Babines whose linguistic or even psychological peculiarities are so glaring that they cannot escape detection even by the most careless observer. Much of their dialect would indeed be 'greek' to an thau'ten (Central Carrier) visitor".

In the map accompanying his 1892 article, Morice labelled the Hwotso'tenne as part of the north-west Carrier area and their language as a Carrier dialect.

But in his later classification (1906-1910) Morice described the western Dene (Athabaskan) language as having three languages, Babine, Carrier and Chilcotin.

In his 1932 study of "The Carrier Language" Morice said the grammatical terminological and morphological peculiarities of the Babine are perhaps enough to make it a really distinct Dene dialect.

Dr. Kari says other researchers such as Jenness, Goldman, Steward and Kobrinsky do not directly address this question of language or dialect. Nevertheless, Dr. Kari, supported by some other modern researchers (particularly Allaire) is satisfied there is a linguistic distinctiveness which entitles it to be called North West Carrier partly because he thinks its range extends to Tatla Lake (even though its inhabitants may have moved there in this century) and is therefore both north and west of the neighbouring Central and Southern Carrier.

Dr. Kari says the geographic area of this language group includes:

(a) Wetsoo Wet'een ("people below, towards the stream") or Bulkley River group;

(b) Xu'en Wet'een ("people off in this distance") or Nii Duut'een ("people of Niiduu Babine Lake") or Babine Lake group;

(c) Tatl'aht'een ("head waters people") or Tatla Lake group; and

(d) the south side of Francois Lake.

In the draft of a paper being prepared for publication, Dr. Kari re-names the North-West Carrier language as Babine-Wet'suwet'en and describes its geographical reach as follows:

> "We estimate that the B-W language area is approximately 10,000 sq. miles in area (Marvin George, p.c.). It encompasses in the Skeena drainage 1) the Bulkley River, Babine Lake and Upper Babine River; in the Fraser drainage 2) most of Francois Lake and Ootsa Lake and upland areas to the west; also in the Fraser drainage 3) the west side of Takla Lake north of the narrows as well as the lower portion of the Driftwood River drainage at the head of Takla Lake. Externally, the B-W language area meets or overlaps the following native language areas: 1) Sekani, an Athapaskan language, meets B-W at Driftwood River and the east side of Takla Lake; 2) Carrier, also an Athapaskan language, borders B-W to the east and southeast between the lower end of Takla Lake and Eutsuk Lake; 3) Haisla, a Wakashan language, is west of the coast mountains west of Morice Lake and Tahtsa Lake;

> 4) the Kitselas dialect of Coast Tsimshian borders B-W west of Telkwa Pass; 5) Gitksan, a Tsimshianic language, borders B-W to the west between upper Copper River in the south and upper Driftwood River in the north."

Because of language separation, Dr. Kari postulates the arrival of Athabaskans in the Wet'suwet'en-Babine area 1500 to 2000 years ago, the disbursal of some to California and Oregon and the south-west later, and the arrival of the Central-Southern Carrier separately and later from the east. The Sekani, for example, are thought to have been relatively recent migrants from east of the Rockies.

Dr. Kari and Dr. Rigsby collaborated on a section of the report entitled "The Relationship of Gitksan and Wet'suwet'en".

Generally speaking, it is thought Athabaskan speakers do not usually borrow freely from other languages. Recent investigations however suggest there has been some borrowing back and forth between Gitksan and Wet'suwet'en even though the two languages are radically different in structure and belong to different language families that are not closely related. There are however some exceptions particularly the Gitksan adoption of names of animals such as beaver, caribou and moose which are specific to the interior, while the Wet'suwet'en have adopted some Gitksan words such as red cedar, fireweed, clam, crab and killer whale which are coastal words.

Of particular interest however is the Wet'suwet'en adoption of words of social organization, especially in relation to feasts. These authors sum up as follows:

> "To begin to sum up, the phonological evidence indicates that it was Gitksan which exercised a conservative influence on Wet'suwet'en and blocked the diffusion westward of the palatal-to-alveopalatal sound shift. There is no evidence that Wet'suwet'en influenced any of the sound changes that can be observed in process or completed in Gitksan. The vocabulary evidence clearly shows that Gitksan borrowed many fewer words from Wet'suwet'en than the latter did from the former, and the Athapaskan loans for animals into Gitksan (and Nisgha) may be reasonably interpreted as evidence for the arrival of Gitksan (and Nisgha) speech in the upriver Interior areas after Athapaskan speech was already established there. The Tsimshianic loanwords for plants and animals into Wet'suwet'en reflect the middleman position of the Tsimshianic-speaking peoples in the regional trading system, as well as their mediating role in introducing the Wet'suwet'en to coastal species. The Tsimshianic loanwords pertaining to features of social organization and items of material culture are consistent with the view that the Wet'suwet'en have adapted their social organization and expanded their technological inventory more than the Gitksan have. In particular, the Wet'suwet'en adapted the feast complex from the Gitksan, as evidenced in loanwords. And the borrowing of the Gitksan vocative form of father indicates that it was common in the past for Gitksan men to marry Wet'suwet'en women."

In his evidence however, Dr. Kari mentioned the above may be overly simplistic, and while many writers use a "dominant theory" he does not know which of these two were dominant, if either one was, although it is ethnologically common to think of Tsimshian as "upscale" and Athabaskan as "down scale".

The evidence of these language specialists supports Gitksan and Wet'suwet'en identity as distinct peoples for a long, long time.

### (i) Historical Geography (Dr. Ray)

Dr. Arthur Ray is an historical geographer and senior professor in the Department of History at the University of British Columbia. He has excellent qualifications in his special areas of expertise which includes the study of the records of the Hudson's Bay Company, in particular those of William Brown who was the first trader into the area, establishing Fort Kilmaurs on Babine Lake in 1822.

Brown was a Scot who had served the Company or its predecessor before he was assigned to New Caledonia, as the area west of the Rockies was called. His assignment was to expand the fur trade. After the establishment of Fort Kilmaurs on Babine Lake he made infrequent trips into what we now regard as Gitksan country along the Babine River. Unfortunately, he did not journey even as far as the forks of the Babine and Skeena Rivers or into the north or south areas of the territory.

As required by his employer, trader Brown filed numerous reports which are a rich source of historical information about the people he encountered both at his fort and on his travels. I have no hesitation accepting the information contained in them.

At p. 55 of his opinion report Dr. Ray summarized some of the conclusions he has reached, mainly from the records of trader Brown, but Dr. Ray's wide experience in these matters undoubtedly also contributed to this evidence. Dr. Ray says:

> "When Europeans first reached the middle and upper Skeena River area in the 1820s they discovered that the local natives were settled in a number of relatively large villages. The people subsisted largely off their fisheries which, with about two months of work per year, allowed them to meet most of their food needs. Summer villages were located beside their fisheries. Large game and fur bearers were hunted on surrounding, and sometimes, on more distant lands. Hunting territories were held by "nobles" on behalf of the lineages they represented and these native leaders closely regulated the hunting of valued species. The various villages were linked into a regional exchange network. Indigenous commodities and European trade goods circulated within and between villages by feasting, trading and gambling activities."

The foregoing represents the strongest statement supporting the plaintiffs' basic position which is to be found in any of the independent evidence adduced at trial. It is worth noting that Dr. Ray believes the natives were located in villages, that they lived off the land, principally the fishery, and hunted in the surrounding lands which were partly controlled by nobles or chiefs, or on some more distant unidentified lands, and that they had established trade patterns or relations with other villages.

The foregoing must be considered in the context of the larger picture which emerged from the evidence. First, it would be incorrect to assume that the social organization which existed was a stable one. Warfare between neighbouring or distant tribes was constant, and the people were hardly amenable to obedience to anything but the most rudimentary form of custom. Brown held them in no high esteem, partly because of their addiction to gambling, and Ogden, about whom there are different views (Dr. Sage called him "kindly," while others refer to his "scorched earth policy in Oregon country"), described them most unkindly.

I conclude from the foregoing, however, that there was indeed a rudimentary form of social organization in the Babine area, and it is reasonable to infer that similar levels of organization then existed in the territory.

The early historic records appear to indicate that "game was never really plentiful" in the territory; "that fishing was the mainstay of the economy;" and the exploitation of animals by the Atnahs or the Carrier was pretty minimal "in terms of food." The plaintiffs' expert evidence indicates two things:

First, moose and deer came into the Claim Area relatively recently.

Secondly, there are references in the journals and reports of Brown that suggest the chief's control of territories was not exclusive, but was limited in some cases to beaver exploitation which was used for ceremonial purposes by the Carrier, but was not nearly so well regarded by the Gitksan in whose country that animal was not nearly so plentiful. In fact, Stuart, writing in New Caledonia in the early 1800's, said that Carriers did not eat meat in nine out of ten years, except at feasts for the dead.

Dr. Ray says at P. 24 of his Report (Ex 960):

> "In contrast to beaver, some other resources were not as carefully husbanded and the "nobles' do not appear to have had first claim on them. For example, men who did not have what Brown referred to as a 'land stake' were allowed to trap martin, the other fur that was in strong demand from the area by Europeans. No mention is made about prohibitions concerning the hunting of large game or the taking of fish. Presumably commoners could exploit the territory of their house for subsistence needs as required."

Thirdly, I heard so much evidence, and I was given so much literature, that it is impossible to do more than extract from it an impression of what was going on in the Babine territory before and during trader Brown's time there.

Doing the best I can, it appears to me that after a period of unknown duration prior to about 1700, during which there were probably villages at the sites we now know about (although there is evidence questioning most of them, eg. Brown never mentioned Kisgegas although he describes some smaller nearby villages on his journeys to that location); major population destabilization began to occur at the coast which probably spread to the interior; warfare became common, if it had not always been present; and within about 10 years of Cook's arrival at Nootka and his discovery of the potential for an ocean fur trade in 1778, the entire coast became, according to Wilson Duff, "glutted with trade goods."

At the same time, there were opportunities for trade goods to reach the interior from the east and south, possibly via the Mississippi (in 1806 Simon Fraser found Indians on his river in possession of a copper kettle "made in England").

By the time trader Brown arrived at Babine Lake in 1822 the coastal sea otter trade was finished but the taste for trade made new initiatives necessary, and the great Tsimshian trading family of Legaic was consolidating its control the lower and middle Skeena.

Also by this time, Alexander Mackenzie had travelled to Bella Coola "overland from Canada"; Captain Vancouver and others had charted most of the north coast in 1794; Simon Fraser had established forts in New Caledonia before 1806; and we may never know precisely what influence Russian traders had on our coast, and inland, but they may have been present and active in trade before they established Fort Wrangle in 1825. In fact, active trade was underway at the coast and spreading inland for at least 30 years before trader Brown arrived at Babine Lake, probably converting a Gitksan and Wet'suwet'en aboriginal life into something quite different from what it had been.

It is significant that trader Brown does not mention Indian Houses in his records. He seems to use the terms tribe, band, clan and family interchangeably, or perhaps imprecisely, but I am left in considerable doubt about the antiquity of the House system. Ogden describes 700 Indians in 28 "houses" in Hotset with 20 ranked chiefs, which doesn't resolve this question.

I find the weight of evidence supports the view that the fur trade materially changed aboriginal life before or around the time trader Brown was making his records at Fort Kilmauers. That does not prevent me from accepting Dr. Ray's opinion that Indian social organization did not all arise by reason of the fur trade. I think the evidence supports that by 1822 the Indians of the Babine Lake region had a structure of nobles or chiefs, commoners, kinship arrangements of some kind and priority relating to the trapping of beaver in the vicinity of the villages.

There is no reason to believe the neighbouring Indians of the territory had any lesser degree of social organization at the same time.

### 3. Conclusions on the History of the Gitksan and Wet'suwet'en People

The scientific evidence, particularly the archaeological, linguistic and some historical evidence persuade me that aboriginal people have probably been present in parts of the territory, if not from time immemorial, at least for an uncertain, long time before the commencement of the historical period. I base this conclusion mainly on the evidence of the archaeologists, particularly Drs. Ames and MacDonald: the linguists, Drs. Rigsby and Dr. Kari: Ms. Harris' genealogical evidence; and trader Brown's records as explained by Professor Ray.

In other words, I think it reasonable to infer from this evidence that before the commencement of the fur trade some aboriginals were living in villages on Babine Lake and along the Babine River, as described by Brown. It is also reasonable to infer, as I do, that the situation in the Skeena and Bulkley Valleys was not dissimilar.

While I generally accept the genealogical evidence of Ms. Harris, it does not intrude far enough back into history to establish a time-depth of presence in any specific part of the territory. As there was no evidence of a population dispersal since Brown's time, however, it is reasonable to infer that some of the kinship relations Ms. Harris has identified would have extended back further in time to and a long time beyond the 1820's when I find that some of the plaintiffs' ancestors were present in the territory.

I am unable to accept adaawk, kungax, and oral histories as reliable bases for detailed history but they could confirm findings based on other admissible evidence.

I therefore infer that the ancestors of a reasonable number of the plaintiffs were present in parts of the territory for a long, long time prior to sovereignty.

I reach this conclusion mainly on the specific evidence mentioned above, which persuades me it is reasonable to infer that some of the people living in this territory during the last 100 years or so, with their present culture, history, known ancestry and language are probably descended from more remote aboriginals who,in my view, must have been present in parts of the territory well before contact with European influences.

In a communal claim of this kind I do not consider it necessary for the plaintiffs to prove the connection of each member of the group to distant ancestors who used the lands in question before the assertion of sovereignty. It is enough for this phase of the case, subject to the other difficult questions I must consider, for the plaintiffs to prove, as they have, that a reasonable number of their ancestors were probably present in and near the villages of the territory for a long, long time.

## PART 9

# THE REMAINING LEGAL ISSUES (SHORT FORM)

Having decided that the ancestors of some of the plaintiffs were present in parts of the territory for a long, long time before sovereignty, the remaining legal questions may compendiously be stated simply:

1. Are the plaintiffs entitled to an aboriginal interest in the territory?
2. If so, what is the nature of the aboriginal interest to which the plaintiffs are entitled? and,
3. To which lands of the territory do such aboriginal interests attach?

As will be seen, each of the foregoing have many sub-questions, and many difficulties.

# PART 10

# THE CREATION OF ABORIGINAL INTERESTS

## 1. The Underlying Title of the Crown

In their pleadings and argument the plaintiffs admit that the underlying or radical or allodial title to the territory is in the Crown in Right of British Columbia. This reasonable admission was one which the plaintiffs could not avoid. It sets the legal basis for any discussion of title.

Counsel seem to be agreed that this underlying title, at least from the establishment of the colony in 1858 until Confederation, was in the Imperial Crown, and was never in the Crown in Right of Canada.

There is limited jurisprudence relating to the title to land actually used or occupied by aboriginals prior to the assertion of sovereignty by a European nation.

Counsel for both the plaintiffs and the province treated me to the writings of scholars who have considered these questions. The plaintiffs referred particularly to early Spanish authors such as Bartolome de las Casas and Franciscus de Vitoria, who wrote in the 16th century. The province referred me to the Swiss writer, Vattel, whose principal work was published in 1844.

The Spanish writers, both Dominicans, denied any right of possession of land by discovery or conquest. De Vitoria said:

> "Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in [Justinian] **Institutes**. And so, as the object in question was not without an owner, it does not fall under the title which we are discussing . . . By itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us."
>
> (Williams, p. 71; F. Vitoria, de Indies et De Iure Belli Relectiones, Classics of International law, ed. E. Nys. (1917))

Vattel, on the other hand, said:

> "There is another celebrated question to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country in which there are none but erratic nations, whose scanty population is incapable of occupying the whole? We have already observed, in establishing the obligation to cultivate the earth, that these nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habita-

> tion in those immense regions, cannot be accounted a true and legal possession, and the people of Europe, too closely pent up at home, finding land of which the Savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it and to settle it with Colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence. If each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not, therefore, deviate from the views of nature, in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English Puritans, who first settled in New England, who, notwithstanding their being furnished with a charter from their Sovereign, purchased of the Indians the lands of which they intended to take possession. This laudable example was followed by William Penn, and the Colony of Quakers that he conducted to Pennsylvania."

Vattel's principle seems to have been accepted by Marshall C.J., in **Johnson v. M'Intosh,** at p. 572-3 when he said:

> "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded by apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other european governments, which title might be consummated by possession. . . .
>
> No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title."

Subsequent authorities make it clear that such sovereignty exists not just against other "civilized" powers but extends as well to the natives themselves: **St. Catherines Milling and Lumber Company v. the Crown (Ont.),** (1887) 13, S.C.R. 577 per Taschereau J. at p. 643. (aff'd), (1889) 14 AC. p. 46 (J.C.P.C.).

Apart from **St. Catherines Milling** just mentioned, there are many other authorities. They include a number of American cases, such as **Johnson v. M'Intosh;** cases in the Privy Council such as **Re Southern Rhodesia,** [1919] A.C. 211 and **Amodu Tijani v. The Secretary, Southern Nigeria,** (1921) 2 A.C. 399 (J.C.P.C.); **The Queen v. Symonds,** (1847) N.Z.P.C. Cases, 387 in New Zealand; and **Milirrpum v. Nabalco Pty Ltd.** [1972-73] A.L.R. 65 in Australia, and many others. None of them suggest that the Crown, upon asserting sovereignty, does not acquire title to the soil.

I think it unnecessary to continue this debate. In my view, it is part of the law of nations, which has become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of sovereignty. Such sovereignty in North America was established in part by Royal grant as with the Hudson's Bay Company in 1670; by conquest, as in Quebec in 1759; by treaty with other sovereign nations, as with the United States settling the international border; by occupation, as in many parts of Canada, particularly the prairies and British Columbia; and partly by the exercise of sovereignty by the British Crown in British Columbia through the creation of Crown Colonies on Vancouver Island and the mainland.

Aboriginal persons and commentators often mention the fact that the Indians of this province were never conquered by force of arms, nor have they entered into treaties with the Crown. Unfair as it may seem to Indians or others on philosophical grounds, these are not relevant considerations. The events of the last 200 years are far more significant than any military conquest or treaties would have been. The reality of Crown ownership of the soil of all the lands of the province is not open to question and actual dominion for such a long period is far more pervasive than the outcome of a battle or a war could ever be. The law recognizes Crown ownership of the territory in a federal state now known as Canada pursuant to its Constitution and laws.

In my judgment, the foregoing propositions are absolute. The real question is whether, within that constitutional framework, the plaintiffs have any aboriginal interests which the law recognizes as a burden upon the title of the Crown. Needless to say, the parties have widely differing views on this question.

## 2. The Province's Preliminary Position

The province takes the position that the new British colonies of Vancouver Island and British Columbia, established in 1846 and 1858 respectively, and amalgamated into the merged Colony of British Columbia in 1866, are classified not as conquered or ceded but rather as settled colonies because British subjects settled here partly under the sponsorship of the Hudson's Bay Company. From that beginning, it was argued, British law followed its subjects, and no one can claim any lands or interests in lands except through the Crown. Then, the argument goes, the only title or rights which can exist are those granted or recognized by the Crown.

Counsel for the province asserts that the policy of the colonies, as pronounced on a number of occasions by Governor Douglas and which was never rescinded, was that the whole of the province would be opened up for settlement except village sites occupied by Indians together with their cultivated fields and surrounding hunting grounds. These occupied lands, later called reserves, were not available for pre-emption or alienation. Furthermore, the Indians had the right, in common with everyone else, to use all of the rest of the vacant public lands of the colony. In this scheme there was, counsel argues, no room for other aboriginal interests.

I can dispose of this submission quickly. There are a number of recent Canadian decisions which suggest aboriginal interests arise by operation of law (perhaps borrowed from the amorphous law of nations), and do not depend upon a grant from the Crown.

First, in **Calder,** none of the judges found it necessary to state the precise nature of aboriginal interests but they clearly had the view that aboriginal rights did not depend upon treaty or statute (per Judson J. at p. 334 and Hall J. at p. 390).

Second, in **Baker Lake,** Mahoney J. made it clear that, in his opinion, aboriginal rights may arise at common law.

Thirdly, in the judgment of the Supreme Court of Canada in **Guerin,** Dickson J. (as he then was), said at p. 378:

> ". . . That principle supports the assumption implicit in **Calder** that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it."

The statement just quoted from **Guerin** was not necessary for the decision in that unusual case, which bears no resemblance to this case. It holds that aboriginal "title", if it exists in particular circumstances, arises apart from constitutional or statutory arrangements or even, I suppose, Acts of State. The Court in **Guerin,** however, did not deal with the nature of aboriginal interests to which I shall return in due course.

Mr. Goldie sought to nullify the above pronouncement in **Guerin** by reference to what appears to be a misunderstanding of the facts in **A.G. Canada v. A.G. Quebec,** [1921] 1 A.C. 401, (J.C.P.C.), (sometimes called **The Star Chrome Case**), to which the Court in **Guerin** refers. It does appear that the lands in **Star Chrome** were indeed within the boundaries of the old province of Quebec at the time of the **Royal Proclamation, 1763.** Notwithstanding this, the authorities must now be considered to have settled the law that, under present Canadian jurisprudence, aboriginal interests arise by operation of law out of long time aboriginal use of specific territory and do not depend upon Crown creation or recognition.

## 3. In What Circumstances do Aboriginal Interests Arise?

### (a) By long time aboriginal use of specific territory

In their Statement of Claim, the plaintiffs allege they have ". . . since time immemorial . . . owned and exercised jurisdiction over the lands . . .," etc. (paras. 56 and 56 (A)), and in their particulars they allege they have, from time immemorial, "lived within the Territory" and have ". . . harvested, managed and conserved the resources within the Territory" (paras. 57 (a) and b)).

While all or most of the plaintiffs' allegations are framed in terms of ownership and jurisdiction, I have already said that I understand such claims also include lesser aboriginal interests.

I am not able to conclude on the evidence that the plaintiffs' ancestors used the territory since "time immemorial" (the time when the memory of man "runneth not to the contrary"). "Time immemorial," as everyone knows, is a legal expression referring to the year 1189 (the beginning of the reign of Richard II), as specified in the **Statute of Westminster, 1275.** In any event, I think a plea of "time immemorial" imposes too high a burden upon the plaintiffs.

What the law requires, as the time-depth component of aboriginal interests, is use for aboriginal purposes for a long and indefinite time prior to the assertion and exercise of European-type sovereignty. Thus if it were shown, for example, that the plaintiffs' ancestors started to use the territory for aboriginal purposes shortly before European contact, or had recently acquired it through conquest of another aboriginal tribe or people, then an aboriginal interest would probably not be recognized.

I do not think it is necessary to dwell unduly on this question. I have already concluded that the ancestors of some of the plaintiffs have been using at least some parts of the territory for a long, long time before the assertion of British sovereignty.

### (b) By the Royal Proclamation, 1763

One of the most interesting parts of the evidence and argument in this case concerned this famous Proclamation which was issued by George III, on the advice of his Ministers, on October 7, 1763 following the completion of the **Peace of Paris** on February 10 of that year. A great deal of interesting evidence was adduced about this Proclamation and I estimate almost one-quarter of the arguments of counsel was devoted to this question. Canada adopted the argument of the province on this question.

As a result, the history of the American Colonies and of Quebec (or Canada) before, during and after the Seven Years War was investigated at trial, including the circumstances of the preparation of the Proclamation; we minutely examined the headwaters of the Mississippi and its tributaries; we studied the "opening up" of the west both from Hudson's Bay, Quebec, and the American Colonies; and we explored the discovery of the Pacific Coast by many intrepid navigators from Europe and Asia. Much of this was done through historical records, of which there are a great many, and by maps prepared during the 15th to 19th centuries which tell the fascinating story I was honoured to hear described by such eminent and knowledgeable scholars.

It is therefore with much hesitation, and with the greatest possible respect both to the witnesses and to counsel who expended so much skill and energy on this question, that I find myself able to dispose of it quite summarily. For reasons which I shall endeavour to state, I do not find it necessary to do more than outline the principal facts and to state my conclusions which result mainly from the language of the Proclamation construed in its historical setting. It is only because the **Royal Proclamation** has received so much unfocused attention in authorities dealing with both Proclamation and non-Proclamation lands, and with Indians generally, that I find it necessary to deal with it as extensively as I do.

In their Statement of Claim the plaintiffs plead that the Royal Proclamation recognizes and confirms their aboriginal rights, that is to say that the Proclamation applies to preserve and protect aboriginal rights in British Columbia. The plaintiffs' pleading is in the following terms:

> "64. The Plaintiffs have enjoyed and still enjoy their aforementioned rights as recognized and confirmed by the Royal Proclamation made by His Majesty King George the Third on the 7th of October, 1763 (hereinafter called the 'Royal Proclamation').
>
> "65. The Royal Proclamation applies to British Columbia and is part of the Constitution of Canada. The Plaintiffs' ownership and jurisdiction over the Territory thereby includes without restricting the generality of the foregoing:
>
>> "1. A right that the Territory be reserved to the benefit of the Plaintiffs until by the Plaintiffs' informed consent the said rights are surrendered to the Imperial or Federal Crown.

> "2. A recognition of the Plaintiffs' aboriginal title, ownership and jurisdiction and the special relationship of the Plaintiffs as Indians to the Imperial or Federal Crown.
>
> 66. In the alternative, by virtue of the Royal Proclamation of 1763, the Plaintiffs enjoy the rights hereinafter set out:
>
> 1. A right of ownership of all lands within the Territory and to territorial waters and to the resources thereon and therein, and
>
> 2. A right to jurisdiction over the Plaintiffs and the members of their Houses and all the land, territorial waters and resources within the Territory, and
>
> 3. A right to the Imperial or Federal Crown's protection in reserving the aforementioned rights to the benefit of the Plaintiffs until, through the informed consent of the Plaintiffs, the said rights are surrendered to the Imperial or Federal Crown."

The Province, on the other hand, takes the position that the Proclamation has never applied to the lands or Indians of British Columbia and has no legal or other effect in this province.

It will be convenient to divide this part of my judgment into three parts: (i) geography; (ii) history; and (iii) analysis.

### (i) Geography

The treaty which formally brought the Seven Years War to an end included as one of its principal parts the cession by France to Great Britain of all of France's North American possessions west of the Mississippi River including her claims to Cape Breton and Nova Scotia (Acadia), Quebec (Canada) and the Island of Grenada.

At this time, Great Britain already possessed Labrador, Newfoundland, the 13 American colonies, and the territories granted in 1670 to the Hudson's Bay Company the boundaries of which were supposed to be settled as between Britain and France by the **Treaty of Utrecht, 1707.** That settlement, however, was never achieved.

Great Britain, on the other hand, recognized the claims of France in North America west of the Mississippi (Louisiana Territory), which France retained until purchased by the United States in 1803.

One of the major issues at trial, relating to the geographic reach of the **Royal Proclamation** to British Columbia, was whether the cession by France of "Canada and all its dependencies" in the Treaty of Paris constituted a transfer of all of North America north of a line drawn west from the headwaters of the Mississippi in the present State of Minnesota, just south of the 49th parallel. The plaintiffs argue that it did, as St. Lusson had claimed all of the west for France at Sault Ste. Marie in 1671, and France had established the Posts of the Western Sea before 1763. These posts achieved that unusual name because it was then thought there was an inland sea or "Mer de L'Ouest" somewhere between the Great Lakes and the great South Sea we now know as the Pacific.

The province denied that Canada in 1763 extended beyond the Great Lakes. Counsel for the province argued that, if it did extend further, the most westerly of these posts was Fort La Corne at the forks of the Saskatchewan River (near Prince Albert). In contrast the plaintiffs asserted that there was a Fort, known as La Jonquiere, near the Rocky Mountains. If there was such a fort, which is possible, it existed for only a very short time and was, admittedly, east of the Rockies. It appears that even the location of those great mountains was much misunderstood in Europe at the time of the Proclamation.

From this, the plaintiffs argue, Great Britain acquired from France all of north-western North America north of the headwaters of the Mississippi. She already had sovereignty over Rupert's Land with its unsettled southern and western boundaries. In short, the plaintiffs say the Proclamation accordingly applied not just to the lands between the original colonies and the Mississippi, but also to all of north-west North America.

The province argues that, at the time of the Treaty of Paris, Canada extended no further west than the area around the Great Lakes, or to Fort La Corne at the very most. Certainly, the province says, it did not apply to the **terra incognita** west of the Rockies as 1763 was 15 years before Cook's landfall at Nootka in 1778. In fact, there had been no significant exploration of the west coast of North America from the time Drake visited the WestCoast in 1579 and the Spanish reached Cape Blanco (43 degrees north) in 1603, until Bering and Chirikov made landings on the north-west coast north of the 56th parallel in 1741. Mueller's 1754 map shows only a broken line for the coastline and practically no detail for the north-west coast. Spanish interest in this coast was not revived until the arrival of Perez on our coast in 1774. Moreover, Cook only visited Nootka momentarily in 1778 before he headed north to Alaska in search of the North West Passage and he did not further visit this coast except on what is now the coastline of Alaska. He was, of course, killed in Hawaii that winter, and although his expedition returned to Alaskan waters the next year, it did not sight our coast again.

Insofar as overland exploration is concerned, La Verendrye may have travelled to within sight of the Rockies in 1741, but more probably what he saw were the Big Horn Mountains of Wyoming. Mackenzie's and Fraser's travels west of the Rockies did not occur until 1791 and 1806 respectively. Both of these intrepid explorers crossed the province south of the territory, and it is thought that either Brown or MacGillvray in the 1820's was the first European in the territory.

While there can be no certainty in most of these matters, the best evidence of what was understood about "Canada" and the lands west of the Rockies can be extracted from contemporary maps and documents. In selecting a few examples I do not intend to suggest that those I have chosen are the only ones I could refer to or that they are conclusive. I think they probably furnish the best view of what was known in 1763 about what is now British Columbia.

In 1754, 9 years before the **Peace of Paris** and the **Royal Proclamation,** a French administrator in New France wrote a report stating that Canada comprised the lands abutting on the St. Lawrence from its mouth to its source, and all the other tributaries that discharge into it (Ex. 1163-181 p. 11; T. 276 p. 20,532-20,533). This would put the western reach of Canada not west of the heights of land west of Lake Superior which divides the St. Lawrence drainage from those of the Mississippi River and Hudson's Bay.

Shortly after the capitulation of Montreal, and in response to British inquiries about the extent of Canada, Vaudreuil, the Governor of New France, described its boundaries to Colonel Frederick Haldimand on a map of North America (the Vaudreuil-Haldimand map). That map and Haldimand's account of Vaudreuil's instructions show Canada extending as far west as Lac Rouge, which appears on the map to be the headwaters of the River Mississippi and which was then thought to be considerably east of its real location. The Vaudreuil-Haldimand map was sent by Commander-in-Chief Amherst to First Minister Pitt, who was responsible for the negotiations with the French, and it was used by the British in negotiating the Treaty of Paris. During the initial stages of the peace negotiations in 1761 the French attempted to expand, at the expense of Canada, the limits of Louisiana which they were to retain. Even in those descriptions of French holdings, France did not extend Canada much beyond Lake Superior.

Maps prepared at the time show how little was known about the western parts of North America. Vaugondy's 1750 map shows **"Terra Inconnues"** for all of the area west of Hudson's Bay north of the 45th parallel and no coastline north of that latitude.

De L'isle's map of 1752 is totally confused with large inland lakes, including a "Mer de l'Ouest" opening from de Fuca's alleged discovery (now thought to be imaginary) and a recognition of the myths of the fictitious Admiral de Fonte and La Honta whose imaginary exploits seem to have misled many map-makers.

Bellin's 1755 map shows a gap in the west coast between 48th and 54th parallels, and then a hand drawn coastline is shown from the 54th to about the 59th parallel with a notation, "one does not know if these are islands or the continent." There is a further notation in a large blank area to the east, "No one knows if these parts are land or sea." To the north and east of this it is stated, also in a large area without any detail, "these parts entirely unknown." In fact, there is no detail on the 60th parallel from the coast to Hudson's Bay, none on the 55th from the coast to Lake Winnipegosis, and none on the 50th from the coast to the Assiniboine River (which is shown in an east-west attitude, with a notation suggesting "it is possible to believe flows to the Western Sea"). There is however, a large note, covering what is now southern British Columbia stating "La MER De L'OUEST," suggesting that much of that province was a large inland sea.

The Bowen Map, dated February 1763, which was probably attached by the Board of Trade to the draft of the **Royal Proclamation,** shows hardly any detail of north-west North America west of Lake Superior; it states the headwaters of the Mississippi are unknown but were thought to be at about 50 degrees of latitude; the West coast is not shown much north of the head of the Gulf of California; and the entire north-west is displaced on one copy by a crude inset map of Hudson's Bay and the islands to the north and east. The Canadian west, including British Columbia, is just left blank on a generalized version. I accept Dr. Farley's evidence that map-makers would show any detail they knew about the northwest as it would make their map more saleable.

In 1777 a further map was produced by Jeffries, which is largely copied from Bowen, but there are a few changes. It is described in its cartouche as:

> "A New and Correct Map of North America with the West India Islands Divided According to the Last Treaty of Peace, Concluded at Paris 10th, Feb. 1763 . . . Laid Down according to the Latest Surveys and Corrected from the Original Material of Gover. Pownall, Mem. of Parlia'mt."

This map shows "the course of all these rivers [flowing from the north into Lake Superior] is not discovered yet"; the Mississippi, "whose head is unknown"; no coastline north of the head of the Gulf of California; and the whole of the Canadian west is blocked out by an insert of Hudson's Bay. This was one year before Cook landed at Nootka and 14 years after the Royal Proclamation.

Lastly, even Arrowsmith's 1790 map gives practically no detail of the interior of the province, and shows Vancouver Island as a part of the mainland.

While the evidence is not conclusive, and I have no doubt Mr. Rush is right when he argues more was known on the ground, it is my conclusion that precious little was known by governments in Europe in 1763 about the western half of North America. The plaintiffs argue for French sovereignty over all of Northern America, other than Rupert's Land, based in part on the 1671 Sault Ste. Marie Proclamation of Saint-Lusson, the establishment of the Posts of the Western Sea in the early to mid 1700's, and the travels of La Verendrye in the 1730's and 1740's. But the fact remains, unquestionably, that there was no French or British discovery, let alone occupation or other assertion of sovereignty over any part of what is now British Columbia prior to 1763.

The French may have had a better claim to (but practically no presence on) the Canadian prairies based upon exploration or discovery even though Kelsey in the service of the Hudson's Bay Company seems to have been the first European to visit the real west, reaching present day Saskatoon in 1690. I am unable to conclude that France ceded the prairies or anything west of the Mississippi, let alone British Columbia, to Great Britain by the Peace of Paris in 1763.

For these reasons it cannot be said that those vast areas were British possessions at the time of the **Royal Proclamation, 1763.**

### (ii) History

I turn next to consider the historical context and the documentation created in conjunction with the preparation of the **Royal Proclamation.** While counsel spent a great deal of time on this, I shall only summarize it briefly.

There is no doubt that prior to the Seven Years War there was great rivalry between the French and the British in North America. The British Forts or "Factories" on Hudson's Bay changed hands with the fortunes of war but, as mentioned earlier, neither the westerly nor southerly boundary of Rupert's Land was ever settled in those early days.

France was well established in Canada (Quebec), while the British maintained parts of the maritime provinces and 13 colonies on the Atlantic seaboard. Both coveted the Ohio country and both needed the support and assistance of the Indians. The British seemed to be more active in securing their friendship, obtained in part by a series of treaties sometimes called the Covenant Chain with the Six Iroquois Nations. During such treaty negotiations, the various British negotiators constantly gave assurances that Indians would be protected in their hunting lands. There is no doubt, however, that what was actually happening on the ground was the constant westward spread of settlers.

The ultimate British success in the capture of Quebec in 1759 was accomplished without Indian assistance, but in the subsequent campaign leading to the surrender of Montreal the British Commander Amherst had almost 1,000 Indian warriors in his ranks. This Indian involvement contributed substantially to the result because such support made continued Indian adherence to the French cause improbable. The French Commander, Vaudreuil, had only 2,000 civilians and regular soldiers at his disposal against Amherst's 10,000, giving the former no alternative but to surrender on September 8, 1760, turning over all of Canada to the British. Although the European phase of this war continued until the signing of the Peace of Paris in February 1763, the struggle between Britain and France in North America was largely over.

The plaintiffs argue, correctly I think, that for 150 years prior to the Peace of Paris, Indian trade, politics and land had been a central factor in the economic, military and political fabric of North America. It is apparent that the support of the Indians contributed substantially to the successful outcome of the struggle for North America. The plaintiffs argue that the British acknowledgment of Indians' rights to their territories and that

Indians could not be deprived of their lands without their consent was fundamental to the survival and expansion of British interests in North America. The plaintiffs argue that:

> "These principles form part of the bedrock of Canadian history and nationhood."

In their outline of argument, the plaintiffs say:

> "Underlying this review of the covenant chain of treaties and conferences is the Indian insistence of and the British recognition that the Indian-Crown relationship be grounded in "justice'. The word crops up again and again in both the exchanges between the Iroquois and the colonial authorities and in the Imperial instructions to the colonial authorities. The Six Nations and the Crown came to agree that justice involved the recognition of the rights of the Indian Nations as the original proprietors of the soil, that their rights to their territories could not be changed without their consent expressed in public council through the treaty protocol; and that the Crown assumed the obligation of protecting the Indian Nations from frauds and abuses in relation to their territorial rights."

The end of hostilities in North America with the surrender of Montreal in 1760 did not end Indian apprehension about the future of their hunting lands, (and I have no doubt they were given many assurances). As was inevitable, there were incidents of Indian uprisings and dissension. British authorities had good reason to maintain good relations with the Indians because white settlers were still heavily outnumbered, particularly in the still distant Ohio where an Indian uprising continued to be a matter of great concern.

During a tour in 1761 Sir William Johnson, the British official responsible for Indian affairs in the northern part of the colonies, heard many stories about a possible uprising, and of dissension on the frontier. At Detroit he met with representatives of many Indian nations and he again gave them many assurances which were well received. Tension continued to build, however, largely because of increasing pressure from settlers and many allegations of unfair means used in obtaining deeds from Indians for their lands. In a 1761 letter to Governor Colden, Johnson said:

> ". . . nothing can tend more to alienate their affection and attachment from His Majesty's interest, than the pressing them to dispose of their lands . . . ,"

and he went on to:

> "entreat you not to pass patents to any lands, that were not given, or sold with the consent of their whole Castle as they say that their Brethren the white people, often make a few of their foolish people drunk, then get them to sign deeds, while the rest, and those, even whose property it is, know nothing at all of the affair."

These problems on the frontier led the Lords of Trade in London to be continually concerned about the safety and security of the American colonies, particularly when they learned General Amherst proposed to make land grants to his soldiers at Fort Niagara. This led Pitt, the Secretary of State, to send a note to the General warning him of the dangers inherent in making grants on lands claimed by Indians.

A report prepared for the Lords of Trade was forwarded to the Privy Council on November 17, 1761 with recommendations which were approved by the Cabinet and the King. The Privy Council directed that the Lord's recommendations be incorporated into instructions to the non-proprietary colonies. These Royal Instructions constitute the most comprehensive statement on Indian territorial integrity which had been made up to that time. Recitals referred to the necessity to "... support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them." The actual instructions provide:

> "[We] Do hereby strictly enjoin and covenant neither yourself nor any lieutenant governor ... do upon any pretence whatever upon pain of Our highest Displeasure and of being forthwith removed from your or his office, pass any Grant or Grants to any persons whatever of any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved to or claimed by them."

Johnson continued to be concerned about the number of incidents which were occurring on the frontier, and **Dr. Jack Stagg,** in his **Anglo-Indian Relations,** (Transcript, p. 23810) concludes that "British-Indian relations had deteriorated to the point of what appeared to be no return. One spark seemed to be the only thing separating a tense situation from an explosion."

The Preliminary Articles of Peace were signed in Paris on November 6, 1762 leaving colonial officials both in London and in America with a large basket of problems, such as how to administer and govern the large French-Canadian population, what security measures were required to protect British possessions, and what policies were to be employed in managing the relationship between the colonies and the Indian nations.

On December 6, 1762, Henry Ellis, Governor Designate of Nova Scotia and a trusted advisor to the Earl of Egremont, Secretary of State for the Southern District, submitted a lengthy report on previous relations between the colonies and some southern tribes with which he was familiar in his former posting as Governor of Georgia.

Ellis recommended, amongst other things, that guarantees should be given that no settlements were planned on Indian lands. Egremont concurred with this and instructed action accordingly. That a plan was in the preparation is demonstrated by correspondence between Egremont and General Amherst. In a letter, dated January 27, 1763, the former expressed his concerns about the dangers of conflict over a questionable purchase of land in the Wyoming Valley at the time of the Albany Conference in 1754, and went on to say:

> "The King trusts, that you will, at least, be able to prevail with the people concerned in this pretended purchase, to suspend, for the present, the making the settlement in question, til you shall have reported to me, for the King's information, a true state of this matter .... His Majesty having it much at heart to conciliate the affection of the Indian Nations, by every act of strict Justice, and by affording them His Royal Protection from any encroachment on the Lands they have reserved to themselves for their hunting grounds, and for their own support and habitation: and I may inform you that a plan, for this desirable end, is actually under consideration."

Ellis is generally credited as the author of what has become known as the "Hints" document which is unsigned and undated, entitled "Hints Relative to the Division and Government of the Conquered and Newly Acquired Countries in America." In these Hints, it is stated:

> "It might also be necessary to fix upon some Line for a Western Boundary to our ancient provinces, beyond which our People should

> not at present be permitted to settle, hence as their Numbers increased, they would emigrate to Nova Scotia, or to the provinces on the Southern Frontier, where they would be useful to their Mother Country, instead of planting themselves in the Heart of America, out of the reach of government, and where, from the great difficulty of procuring european Commodities, they would be compelled to commence Manufactures to the infinite prejudice of Britain."

On May 5, 1763 Egremont wrote to the Lords of Trade requesting a report on the various problems associated with the newly-acquired territories in America. He framed one of his principal questions in the following terms:

> "The second question, which relates to the security of North America, seems to include two objects to be provided for; the first is, the security of the whole against any European Power; the next is the preservation of the internal peace and tranquillity of the country against any Indian disturbances. Of these two objects, the latter appears to call more immediately for such regulations and precautions as your Lordships shall think proper to suggest."

Egremont offered the Lords the following suggestion which he called "Lights":

> "Tho' in order to succeed effectually in this point, it may become necessary to erect some Forts in the Indian Country, with their Consent, yet His Majesty's Justice and Moderation inclines him to adopt the more eligible Method of conciliating the minds of the Indians by the Mildness of his Government, by protecting their Persons and Property and securing to them all the Possessions, Rights and Privileges they have hitherto enjoyed, and are entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only and it has been thought so highly expedient to give them the earliest and most convincing Proofs of His Majesty's Gracious and Friendly Intentions on this Head, that I have already received and transmitted the King's Commands to this Purpose to the Governors of Virginia, the Two Carolinas and Georgia . . ."

It is not difficult to recognize the foregoing as one of the sources of some of the thoughts and language of the Royal Proclamation.

The initial task of drafting the requested report was given to John Pownall, the Permanent Secretary to the Lords of Trade. His draft, called a "Sketch," endorses the idea of restraining westward expansion of the old colonies.

In his "Sketch" Pownall said permitting the colonies to "extend their settlements" too far would:

> ". . . probably induce a necessity for such remote settlements (out of reach of navigation) to engage in the production and manufacture of those articles of necessary consumption which they ought, upon every principle of true policy, to take from the mother country . . ." (Ex. 1026-23, Morrison, Transcript, vol 222, p. 16,166)

The Report of the Lords of Trade was submitted to Egremont on June 8, 1763. It contains much economic advice, including a statement that the region around the Great Lakes ". . . which avowedly belonged to the Six Nations of Indians" was potentially the richest fur trading area, and it also recommended a mercantilist approach to settlement which would concentrate populations near the sea coast and so they would be available to English markets.

With regard to the Indian problem, the Board recommended:

> "... that Territory in North America which in Your Majesty's Justice and Humanity as well as sound Policy is proposed to be left under Your Majesty's immediate Protection, to the Indian Tribes for their hunting grounds, where no Settlement by planting is intended immediately at least, to be attempted and consequently where no particular form of Civil Government can be established. In such Territory we would propose, that a Free Trade with the Indian Tribes should be granted to all Your Majesty's Colonies and Subjects under such Regulations as shall be judged most proper for that End, and under the protection of such Military Force, to be kept up in the different Posts and Forts in the Indian Country as may be judged necessary, as well for the Protection of Trade and the good Treatment of the Indians as the Maintenance as Your Majesty's Sovereignty and the general defence of North America."

In terms of the boundaries of the proposed Indian country, the Board recommended:

> "leaving a large Tract of Country around the Great Lakes as an Indian Country, open to Trade, but not to Grants and Settlements, the Limits of Such Territory will be sufficiently ascertained by the Bounds to be given to the Governors of Canada and Florida on the North and South, and the Mississippi on the West; and by the strict Directions to be given to Your Majesty's several Governors of Your ancient Colonies for preventing their making any new Grants of Lands beyond certain fixed Limits to be laid down in the Instructions for that purpose ...
>
> It is needless to state with any degree of precision the Bounds and Limits of this extensive Country for We should humbly propose to Your Majesty that the new Government of Canada should be restricted, so as to leave on the one hand, all the Lands lying about the great Lakes and beyond the Sources of the Rivers which fall into the River St. Lawrence from the North to be thrown into the Indian Country ..." (Pltf. Vol. III, p. 207)

With its Report, the Lords of Trade probably included a copy of the Bowen Map of 1763 which I have already mentioned.

In July 1763 Egremont responded to the Report, advising it had been laid before the King who had expressed approval of the plan to establish three new colonies of North America — Canada and East and West Florida — and he stated:

> "His Majesty entirely concurs in your Lordship's Idea, of not permitting any Grant of Lands or New Settlements, beyond the Bounds proposed in your Report; And that all the Countries, beyond such Bounds, be also, for the present, left unsettled, for the Indian Tribes to hunt in; but open to a free Trade for all the Colonies." (Pltf. Vol. III, p. 208)

Lord Egremont, however, disagreed about civil jurisdiction in the Indian country for fear of fugitives taking refuge there, and out of concern that foreign countries might otherwise regard it as "derelict lands." The Lords of Trade agreed with this but advised against adding the new territory to Canada as that would give it an unfair trading advantage over other colonies. The Lords suggested a commission should be given to the military Commander-in-Chief of North America for the governance of the new trade. The Lords also suggested further information should be obtained, not apparently then knowing that most of the military forts in the interior, except Detroit, had been captured by Indians in Pontiac's Rebellion. The Lords concluded their response:

> "In the meantime, we humbly propose that a Proclamation be immediately issued by Your Majesty as well on Account of the late complaints of the Indians, and the actual Disturbances in Consequence, as of Your Majesty's fixed Determination to permit no grant of lands nor any settlements to be made within certain fixed Bounds, under pretence of Purchase or any other Pretext whatever, leaving all that territory within it free for the hunting Grounds of those Indian Nations Subjects of Your Majesty, and for the free trade of all your Subjects, to prohibit strictly all Infringements or Settlements to be made on such Grounds . . ." (p. 211)

The Earl of Egremont died suddenly on August 21, 1763, and was replaced by Lord Halifax who advised the Lords of Trade, on September 19, 1763, that the Government endorsed the idea of issuing a Proclamation "to prohibit for the present any Grant or Settlement with the Bounds of the Countries intended to be reserved for the Use of the Indians," and he made other comments.

After some amendments, the Royal Proclamation was issued on October 7, 1763.

### (iii) Analysis

In this part of my judgment I shall furnish a brief summary of the language of the **Royal Proclamation,** with some Comments. I shall intermix quotations with paraphrasing.

**Part I** The Proclamation is styled "[Establishing New governments in America]" and it is dated "1763, October 7." It goes on to assert that His majesty (George III) has taken into his "Royal Consideration" the extensive and valuable acquisition in America secured to his Crown by "the late Definitive Treaty of Peace" at Paris, and "being desirous" that all his loving subjects, Crown and Kingdom, including the Colonies of America, may avail themselves of the great Benefits and Advantages which must accrue to their Commerce, Manufactures, and Navigation:

1) "We have thought fit to issue this Proclamation to declare that we have granted Letters Patent to erect within the Countries and Islands ceded to us Four distinct and separate Governments called Quebec, East Florida, West Florida and Grenada with boundaries as follows:

2) "First, the Government of Quebec, bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that river through the Lake St. John to the South End of the Lake nigh Pissin [Nipissing], from whence the said Line crossing the river St. Lawrence and the Lake Champlain in forty five Degrees of North Latitude, passes along the High Lands which divide the rivers that empty themselves into the said River St. Lawrence, from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West end of the Island of Anticosti, terminates at the aforesaid River of St. John."

[**Comment:** This, of course, is but a small part of what we now know as the Province of Quebec. The Quebec delineated by the Proclamation consisted only of the Labrador coastline south of St. John's River, a strip measuring less than 100 miles in width along the north shore of the St. Lawrence River extending as far west as Lake Nipissing and a narrower strip along the south shore and the Gaspe peninsula. The rest of what is now Quebec south of the St. Lawrence was part of either Nova Scotia or of the original American colonies. The boundaries of Quebec were greatly enlarged in 1774 to include most of the Great Lakes drainage and the Ohio country, much of which was ceded to the United States in 1783 after the Revolutionary War. Quebec was then divided into Upper and Lower Canada in 1791, renamed Ontario and Quebec at Confederation in 1867, and in 1912 assumed more or less her present dimensions, but including most of Labrador. Labrador was carved out of Quebec in a "settlement" imposed by the Imperial Privy Council in 1927.]

(3), (4) and (5) of the Proclamation define the territories of East and West Florida and the Island of Grenada.

6) To promote fishing, all of the coastline of Labrador from the River St. John to "Hudson's Straights," together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, were placed under the care of the Governor of Newfoundland.

7) The Islands of St. John's (now Prince Edward Island), and Cape Breton or Isle Royale, with the lesser Islands adjacent thereto, were transferred to Nova Scotia.

8) Deals with certain lands which were annexed to the then Province of Georgia.

**Part II** "Our said new Governments" were:

1) given express Power and Direction to summon and call General Assemblies within the said Governments respectively in such Manner and Form as is used and directed in those Colonies and Provinces in America;

2) given power to "make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and Good Government of Our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies: And in the mean Time and until such Assemblies can be called as aforesaid, all Persons inhabiting in, or resorting to Our said Colonies, may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England;"

3) given power to erect and constitute "Courts of Judicature and Public Justice . . . for the hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to [the] Privy Council."

4) to give to the said Three New Colonies upon the Continent, full Power and Authority to settle and agree with the Inhabitants of Our said New Colonies, or with any other Persons who shall resort thereto, for such Lands etc. ". . . as are now, or hereafter shall be in Our Power to dispose of . . ." under such conditions as shall be necessary and expedient for the Advantage of the Grantees, and the Improvement and Settlement of the said Colonies.

**Part III** testifies to the concern of the Sovereign for officers and soldiers who fought for Britain, and directed the Governors of the said Three New Colonies and other Governors on the Continent to grant, without Fee or Reward, to such officers and soldiers actually living in the colony, up to 5,000 acres of land for field officers, 3,000 for Captains, etc., down to 50 acres for "every Private man," and there was a similar direction for "sailors [who] served on Board Our Ships of War in North America at the Times of the Reduction of Louisbourg and Quebec in the late War . . .".

**Part IV** The Preamble is significant and recites as follows:

> "And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, **with whom We are connected, and who live under Our Protection,** should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, **as their Hunting Grounds;"** (my emphasis).

This Part of the Proclamation goes on to declare it to be "Our Royal Will and Pleasure":

(1) "that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, **for the present, and until Our further Pleasure be known,** to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them."

(2) **"for the present as aforesaid,** to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial Leave and Licence for that Purpose first obtained.

[**Comment:** this language has understandably caused a great deal of learned discussion. The Preamble makes it clear these lands are reserved to Indians "as their Hunting Grounds," and Clause 1 precludes the Governors, etc. "for the present" not to sell the said lands to others.]

Clause 2, clearly establishes a hunting reserve for the use of the Indians.

The Proclamation then goes on to "further strictly enjoin and require" everyone to vacate all lands reserved to the said Indians as aforesaid. Then, after reciting that "great Frauds and Abuses have been committed in the purchasing Lands of the Indians," and in order to prevent such frauds in the future, and "to the End that the Indians may be convinced of Our Justice and determined Resolution to remove all reasonable Cause of Discontent," gave certain directions which may be summarized as follows:

(1) all private persons were strictly enjoined from "purchasing" any land reserved for the Indians;

(2) if, at any time, any Indians should be inclined to dispose of the said Lands, the same shall be "purchased" only for the Crown at a public meeting or Assembly held for that purpose by the Governor or Commander in Chief conformable to such Directions and Instructions as they shall be given.

Notwithstanding the **St. Catherine's Milling** case and some uncertain language such as "for the present, and until our further Pleasure be known," and "dispose" rather than "sell" or "convey" or "transfer," some commentators view the Proclamation as creating a proprietary interest in the hunting ground.

While it is not necessary for my decision, it is my view that the Proclamation, at most, created a right determinable at the pleasure of the Crown to use Proclamation lands as "hunting grounds." This was a right they could "dispose of," presumably to a "purchase[er]" only by first transferring their interest to the Crown in the manner required by the Proclamation. This was obviously to ensure no private deals would be made for the lands of the hunting ground.

For the reasons which follow, however, it is not necessary for me to decide this interesting question but I must observe that this question was the subject of an important comment by the Privy Council in **St. Catherine's Milling.**

It was also declared that trade with the Indians should be free and open to all Subjects, provided that everyone doing so should take out a Licence for such purpose giving security to observe such Regulations as may be imposed.

The last clause in the Proclamation required all officers of the Crown to seize and apprehend all persons who, standing charged with any offence, takes refuge in the said reserved Territory, and to send them under a proper Guard to the Colony where the Crime was committed "in order to take their Trial for the same."

I have attached as Schedule 3 the generally approved copy of the **Royal Proclamation** to which I have added paragraph letters and numbers which were used by Mr. Rush and Mr. Goldie respectively.

I have no doubt that, apart from setting up governments for the new colonies, the underlying purposes of the Proclamation were firstly to pacify the frontier for defensive or military purposes, and secondly to secure the markets of the North American colonies for the manufactured products of the mother country.

For the purposes of this case two questions arise: to what lands, and to which Indians, does the Proclamation apply?

The territorial reach of the **Royal Proclamation** was the subject of a great deal of evidence and argument at trial. There seems to be little doubt that the eastern and western boundaries of the affected lands were the Appalachians and the Mississippi respectively. I *am not concerned* with the north-east, that is north and east of Quebec, but there is controversy about the northwest. In 1763 neither the northern limit or headwaters of the Mississippi nor the southern boundary of Rupert's Land were known.

It was generally understood that the headwaters of the Mississippi were situated in marshy ground between the 47th and 51st degrees of north latitude, and contemporary maps showed the southern boundary of Rupert's Land west of the Great Lakes was the 49th parallel. It was assumed that the Mississippi and the 49th intersected, or came so close as to make no difference. **The Historical Atlas of Canada, 1980,** compiled by many of Canada's leading historians and geographers adopts this assumption in its Plate 42, which limits the territory of the Proclamation to the St. Lawrence watershed and to other lands east of the Mississippi.

Mr. Rush argues, however, that Rupert's Land should be much more closely restricted to the immediate area of Hudson's Bay, and he rejects the suggestion that it extended as far west as the Mississippi. His argument leaves the western reach of the Proclamation north of the headwaters of the Mississippi open-ended either because Canada extended to the Pacific Coast, or because the Proclamation extend that far.

I do not propose minutely to consider every word of the Proclamation because I am satisfied its language demonstrates beyond any question that it applied only to the benefit of certain lands and specified Indians.

As to lands, I have no doubt the lands of North America north and west of the headwaters of the Mississippi were not lands over which the British Crown had any authority in 1763, except for Rupert's Land which was not within the reach of the Proclamation.

The first mention of Indians in the Proclamation is in the Preamble to Part IV which describes "the several Nations or Tribes of Indians, **with whom We are connected and who live under Our Protection."** Every reference to Indians in the balance of the Proclamation refers to "the said Indians" indicating that the only Indians embraced by the Proclamation are those with whom the Crown was "connected" and who lived "under the protection" of the Crown.

Shortly before the date of the **Royal Proclamation,** Lord Halifax, who succeeded Egremont as Secretary of State for the Colonies, requested the Lords of Trade to prepare a plan for Indian trade in North America. The Board sent a draft plan to Sir William Johnson, presumably for his consideration, but the plan was never implemented because of objections from traders about its impracticability. For example, the plan required the Indians to come to the forts in order to trade while it was often found necessary for the traders to go to the Indians. Ad hoc arrangements were made in the field, but the idea of a plan was revived after the extension of the Quebec Act of 1774 which gave Quebec control of the fur trade and exempted that province from the operation of the **Royal Proclamation.**

In 1777 a Plan was enacted in Quebec by Ordinance which included the following terms:

> (a) "1. That the Trade and Commerce with the several Tribes of Indians in North America **under the protection of His Majesty** shall be free and open to all His Majesty's subjects, under the several Regulations and Restrictions hereafter mentioned so as not to interfere with the Charter of the Hudson's Bay Company."
>
> (b) "2. That for the better Regulation of this Trade, and the Management of Indian Affairs in general, the British Dominions in North America be divided into two Districts, to comprehend and include the several Tribes mentioned in the annexed Lists A. and B."

The Lists A. and B. include 54 tribes, 12 in the Southern District and 42 in the Northern District. Of those in the Northern District, all but the Sioux lived East of the Mississippi. Many contemporary maps showed the Sioux living on both sides of that river, and in a report dated August 13, 1763 Sir William Johnson identified them as residing westward of the Mississippi, but of unknown numbers and much addicted to "wandering." He also said they ". . . are little known to us" but they had promised to send Deputies to him "in the Spring."

None of the tribes living in Rupert's Land (or on the Canadian prairies or in British Columbia) were mentioned in the Lists. In 1764 Sir William Johnson, in a letter to Thomas Gage, referred to the "Christeneaux" (Crees) North West of Lake Superior who "had no hand in the War, [and] are rather remote to give us much trouble . . .,"

I have given this question much careful thought, particularly the plaintiffs' arguments that the **Royal Proclamation** should be given a prospective construction so as to include tribes of Indians with whom the Crown later became "connected" or who later found themselves under its protection.

I am unable to accept this submission. The tenor of the Proclamation in its historical setting clearly relates to the practical problems facing the Crown in its then American colonies. Two of the Indian clauses of the Proclamation actually state that they are prescribed for "the present," and a fair reading of the document makes it clear that it relates to and applies for the use of the **said** Indians, who are those with whom the Crown was connected, etc., and over whom the Crown then exercised sovereignty. It must be remembered that Britain had just obtained sovereignty of all of North America east of the Mississippi, but its new and old colonial governments had jurisdiction over peoples and territories which were much more limited. It is the Indians in these extra lands which were included within the reach of the Proclamation. The Crown had no connection with the Indian people west of the Rockies who owed the Crown no actual or even notional allegiance, and were in no way under its protection.

I have also considered recent jurisprudence such as **Nowegijick v. The Queen** and many others which establish a **contra proferentes** approach favourable to Indians. **Nowegijick** has recently been considered by the Supreme Court of Canada in **Mitchell et al v. Peguis Indian Band,** (1973) S.C.R. 577 where LaForest J. suggests different principles may apply as between treaties and statutes. He expressly disagrees that statutory interpretations favourable to Indians must always be reached.

In a proper case I think it is appropriate to apply a purposive approach to the language of an instrument such as the **Royal Proclamation** which is much closer to a statute than to a treaty. As I have said, its principal purposes were to establish new governments, to settle present and anticipated difficulties on the frontier, and to encourage British mercantilism by limiting the spread of settlement too distant from coastal trade. The extension or application of the Proclamation to unknown Indians in unknown lands beyond or north-west of the Mississippi, particularly to the **terra incognita** of the "Canadian West," in no way served those purposes.

I am further satisfied beyond any doubt that the Crown was not "connected" in any way with the Indians of the Canadian west in 1763. They did not live under the Crown's protection, and they owed the Crown no actual, legal or notional allegiance.

There is nothing which persuades me that this Proclamation, either by its language or by the intention of the Crown, applies to the benefit of the plaintiffs or to the lands of present day British Columbia.

It is then argued that if the **Royal Proclamation** does not apply to British Columbia, it is at least a statement of the policy of the Crown calling for liberal and generous treatment of Indians. With respect, I do not understand how the Proclamation, in areas beyond its reach, can be applied to displace the common law which recognizes the right of the Crown to create colonies and to settle them with its subjects. The law, in my view, required the preservation of village sites etc., and the policy of the Crown was from the beginning to permit Indians the free use of all vacant Crown lands. In fact, it was thought the policy of the new colony of British Columbia was a liberal and generous one as will be shown although it did not always work out that way. It is not always possible to compare policies to determine which one is the most liberal.

## 4. Conclusions

My first conclusion on this question, for the purposes of this case, is that aboriginal interests arise by operation of law upon indefinite, long aboriginal use of lands. Plaintiff's counsel referred to this as a common law right. It is probably now convenient to so describe this kind of aboriginal right.

Secondly, I have concluded that the **Royal Proclamation, 1763** has never had any application or operation in British Columbia.

## PART 11

# THE RELEVANT POLITICAL HISTORY OF BRITISH COLUMBIA IN THE PRE-COLONIAL AND COLONIAL PERIOD

Having discussed the creation of aboriginal interests, I propose next to explore the history of the province in some considerable, but by no means complete, detail. This is necessary because, as Chief Justice Dickson has said, these questions must be decided in an historical setting. Much of what appears in this and the next Part of this judgment have already been touched upon in Part 4, but not in such detail as I now propose.

I cannot deny that I shall omit a great deal of what others may think is important. It is remarkable that so much of the written record of these events has been preserved. Many excellent histories have been written about the province but it was not until recently have historians and other writers have turned their attention specifically to Indian and land claim matters.

While it is not usually good practice, I propose to adopt a "scissors and paste" format because I think it will be useful to allow the participants — those who were actually on the scene dealing with these problems — to be judged by their own words, rather than by the reconstruction of writers. I shall, however, interject myself into the narrative to offer comments as I think necessary.

History has largely ignored Spanish and Russian exploration of the Pacific coast of what is now British Columbia. I propose to do the same although there can be no doubt some trade and other goods started to arrive on the coast before contact and some filtered into the interior. However, I do not recall any evidence of Russian settlements on our coast prior to the arrival of Capt. Cook in 1778.

The convenient starting point, therefore, must be Captain Cook's visit to Nootka in 1778. His reports reached London in 1780. That really started the North Pacific sea otter trade which exploded in the middle years of that decade. At about the same time, or in quick succession after Cook, came (a) other Spanish and British exploration of the coast (which was, incredibly, all explored by 1794); (b) the overland voyage to the coast by Alexander Mackenzie in 1791 (he missed meeting Vancouver in Dean Channel by less than a month); and (c) the exploits of Simon Fraser in establishing posts at Fort MacLeod in 1805, at Fort St. James and Fort Fraser in 1806, and his remarkable trip down his river to its mouth and back also in 1806.

These endeavours all foreshadowed eventual British sovereignty. Its first legal manifestation was probably **An Act for Extending the Jurisdiction of the Courts,** 1803, 43 Geo. III, c. 138 (the "1803 Act"), and the later **An Act for Regulating the Fur Trade and Establishing a Criminal and Civil Jurisdiction Within Certain Parts of North America,** 1821, 1 & 2 Geo. IV, c. 66 (the "1821 Act"). Both of these statutes were repealed by the Act establishing the colony of British Columbia in 1858. Both the 1803 and 1821 Acts conferred upon the Courts of the provinces of Upper and Lower Canada extra-territorial jurisdiction to deal with Crimes and Offenses committed "... within any of the Indian territories, or other parts of America not within the limits of either of the said provinces ...," and within Rupert's Land.

Captain Vancouver actually explored the lower reaches of the Columbia River in the 1790's and the Oregon country later attracted traders both from Britain's North American colonies as well as from the United States, who in 1819 took over all of Spain's "pretensions" to the coast.

After the war of 1812, a Convention was reached in 1818 which settled the 49th parallel as the boundary between Great Britain and the United States west of Lake of the Woods to the "Stony Mountains," as the Rockies were then known.

This Convention included a "stand still" agreement to last for 10 years (which was extended indefinitely in 1827) for any country that might be claimed by either of them on the north-west coast of America westward of the Stony Mountains. It was agreed that the citizens of each country would have free access to such country without prejudice to the claims of the other.

In 1821 the Czar of Imperial Russia issued a Ukase claiming exclusive rights to trade on the Pacific coast as far south as the 51st parallel. This "pretence" was disputed by both the United States and Great Britain and in 1825 Britain and Russia agreed on the present boundary between Canada and Alaska as the northerly limits of Great Britain's possessions.

Because of the 1818 and 1827 standstill agreements, it must be recognized that Great Britain did not have exclusive sovereignty over southern British Columbia until the Oregon Boundary Treaty of 1846.

As to northern British Columbia, Great Britain granted a 21 year monopoly (renewed in 1838) over her possessions north and west of the United States but disputes continued with the United States until the Oregon Boundary Treaty in 1846.

Also in 1821 the Company assigned James Douglas to its New Caledonia operations. Douglas served there until 1830 when he was transferred to Fort Vancouver on the Columbia River and became its Chief Trader in 1834 and Chief Factor in 1839. Anticipating an unfavourable outcome of boundary negotiations, the Company sent him in 1842 to reconnoitre Vancouver's Island (as it was then known), where the Company planned to relocate its operations. The "Introduction" to the **Fort Victoria Papers, 1846-1851,** suggests that as late as 1852 even the Indians knew "little about the interior" of the Island, and the Cowichan Valley was not "discovered" until 1851. Under the directions of Douglas, the Fort at Victoria was completed in 1843.

It is significant, chronologically, to note that in 1844 a Select Committee of the Imperial House of Commons published a Report dealing with the **Treaty of Waitangi, 1840** which raised many questions about aboriginal rights to lands in New Zealand. This was mentioned in the evidence and argument in this case and it will be discussed later. I mention it here only because it may have influenced Douglas in the views he later expressed about Indian matters.

In 1846 the Oregon Treaty divided the United States and British territory west of the Rockies at the 49th parallel, but the Treaty left Vancouver's Island in British hands (although the actual boundary through the inland sea was not settled until 1898).

The **Oregon Boundary Treaty, 1846** has been judicially accepted as establishing, conclusively, British sovereignty over what is now British Columbia: **Reference re Ownership of the Bed of the Straight of Georgia,** [1984] 1 S.C.R. 388, p. 402 to 406. Occupation of sorts started in New Caledonia, as has been mentioned, in 1805-06 with the establishment of Posts by Simon Fraser. This process continued with posts at Fort Langley in the Fraser Valley in 1827, at Fort Kilmaurs on Babine Lake in 1822, Fort Connolly on Bear Lake in 1826, Fort McLaughlin at Bella Bella in 1834, Fort Simpson near Prince Rupert in 1835, and the new Fort Babine was established in 1836 at the north end of Babine Lake, replacing Fort Kilmaurs which was some distance further south on the same lake. As just mentioned, the Fort at Victoria was completed in 1843.

In 1849, Douglas actually moved the headquarters of the Company to Fort Victoria with its gold and "collected treasures" valued at about £30,000, upon which Fort Victoria superseded Fort Vancouver as the Company's Pacific headquarters.

Because of the view I have of this case, I do not think it is necessary to make a specific finding about a date of British sovereignty over the northern part of the province. No specific argument was made by counsel on this question. For practical purposes, especially in the territory it could well have been as early as the 1820's but legally it may not have been until the creation of the colony in 1858. 1846 was the date chosen by Judson J. in **Calder.** In my view the actual date of British sovereignty, whether it be the earliest date of 1803 or the latest date of 1858, or somewhere in between makes no difference.

Fearing an influx of Americans, and probably influenced greatly by the Company, the Imperial Government decided to create a Colony of Vancouver Island. This was done in an unusual way. First, by Royal Grant dated January 13, 1849, the Crown conveyed Vancouver's Island to the Company. Its recitals and operative parts make its intention clear. These recitals mention the Royal Charter of 1670 for Rupert's Land; the 1803 Act; the 1821 Act; the 1838 Exclusive Licence for trade with the Indians; the Oregon Boundary Treaty of 1846, the fact that lands and territories of the Crown lie westward and northward of Rupert's Land and eastward of the territories defined by the Oregon Boundary Treaty; the trading of the Company beyond the limits of its Charter and licence; the erection of forts and posts on Crown lands (including Vancouver's Island); and the benefits to peace, advancement of colonization, the promotion and encouragement of trade, and the protection and welfare of the Indians residing within Vancouver's Island if such island were colonized. In other words, the Crown wished the island to be settled by British settlers.

Secondly, in the same year of 1849 the Imperial Crown established the Colony of Vancouver Island. It had been understood that Douglas would be appointed Governor while continuing as Chief Factor of the Hudson's Bay Company. It was thought better, however, to appoint a non-Company man as Governor, so the first incumbent was Richard Blanshard. His Commission, as with Douglas's subsequent Commission, was entirely silent on the question of Indian matters.

The Grant conveyed Vancouver's Island to the Company to be held on the same terms as it held Rupert's Land ("... in free and common soccage ...") which is almost, but not quite, fee simple. The Grant clearly contemplated settlement, for it included a proviso that the Grant could be revoked if a settlement of resident colonists had not been established within five years. There is an anonymous document, perhaps a briefing paper, dated March 1849, which suggests a recognition of aboriginal interests. It states in part:

> "With regard to the Indians it has been thought on the whole the better course to make no stipulations respecting them in the grant. Little is in fact known of the natives of this island, by the Company or by any one else. Whether they are numerous or few, strong or weak: whether or not they use the land for such purposes as would render the reservation of a large portion of it for their use important or not, are questions which we have not the full materials to answer. Under these circum-

> stances, any provisions that could be made for a people so distant and so imperfectly known might turn out impediments in the way of colonization, without any real advantage to themselves. And it is thought the more safe to leave this matter to the Company, inasmuch as its dealings with and knowledge of the North American Indians are of course very extensive; and inasmuch as, notwithstanding the many accusations of which that Company has been the object, no distinct charges of cruelty or misconduct toward the Indian tribes under its control have been made out by reasonable evidence; while every year brings painful account of mutual wrongs and mutual revenge between Indians and whites from the neighbouring regions not under their control. It must however be added that in parting with the land of the island Her Majesty parts only with her own right therein, and that whatever measures she was bound to take in order to extinguish the Indian title are equally obligatory on the Company." (Ex.1039-16)

The meaning of this is difficult to discern because of a lack of precision in the language which is of crucial importance in this case. It could mean either that the Indians had a claim of ownership to, or some lesser interest in the entire Island, or only with respect to the parts actually used by them. It is apparently an incomplete document, probably intended for the use of the Colonial Secretary, Lord Grey, who had the responsibility of defending the grant in the debate that took place in Parliament in 1848. In 1846, in connection with New Zealand, he expressed the following views in writing:

> "The Queen, as entitled in right of her Crown to any waste lands in the colony, is free to make whatever rules Her Majesty may see fit on the subject. The accompanying Charter accordingly authorizes the Governor to alienate such land. The accompanying instructions direct how that power is to be used. I proceed to explain the motives by which those instructions have been dictated.
>
> The opinion assumed, rather than advocated, by a large class of writers on this and kindred subjects is, that the aboriginal inhabitants of any country are the proprietors of every part of its soil which they have been accustomed to make any use of, or to which they have been accustomed to assert any title. This claim is represented as sacred, however ignorant such natives may be of the arts or of the habits of civilized life, however small the number of their tribes, however unsettled their abodes, and however imperfect or occasional the uses they make of the land. Whether they are nomadic tribes depasturing cattle or hunters living by the chase, or fishermen frequenting the seacoasts or the banks of rivers, the proprietary title in question is alike ascribed to them all.
>
> From this doctrine, whether it is maintained on the grounds of religion or of morality, or of expediency, I entirely dissent. What I hold to be the true principle with regard to property in land is that which I find laid down in the following passage from Dr. Arnold . . .
>
> Men were to subdue the earth: that is, to make it by their labour what it would not have been by itself; and with the labour so bestowed upon it came the right of property in it. Thus every land which is inhabited at all belongs to somebody; that is, there is either some one person or family, or tribe, or nation who have a greater right to it than any one

> else has; it does not and cannot belong to everybody. But so much does the right of property go along with labour, that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages — country which have been hunted over, but never subdued or cultivated. It is true, they have often gone further and settled themselves in countries which were cultivated, and then it becomes a robbery; but when our fathers went to America and took possession of the mere hunting-grounds of the Indians — of lands on which man had hitherto bestowed no labour — they only exercised a right which God has inseparably united with industry and knowledge . . ." (Ex. 1251-5)

It is argued by the province that the grant of Vancouver's Island to the Company for the purposes of settlement, and without any mention of Indians, is inconsistent with the existence of any aboriginal interests. Authorities such as **Guerin** make it impossible for me to accept that submission, but the foregoing passage seems to limit such interests to cultivated areas.

There is no doubt that Douglas, from the very beginning of his tenure first as Chief Factor and later as Governor of the new Colonies, was concerned about the question of Indian interests. As early as 1849, in a letter to Barclay, who was an officer of the company in London, he said:

> "Some arrangement should be made as soon as possible with the native Tribes for the purchase of their lands, . . ."

He added:

> "I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians' Fisheries, Village Sites and Fields, should be reserved for their benefit and fully secured to them by law." (Ex. 1039-21)

As will be seen, much difficulty arises from the lack of precise terminology. In reply, for example, Barclay stated:

> "The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown." (Ex. 1039-22)

Even a literal reading of this is inconclusive but it indicates some form of Indian interest existing alongside the ownership of the soil in the Crown. Barclay's viewpoint was undoubtedly shaped in part by the Report of the Select Committee of the House of Commons, to which Report he actually referred when he stated:

> "With respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on at the time when the Island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purposes of colonization . . .
>
> A Committee of the House of Commons, which sat upon some claims of the New Zealand Company, reported in reference to native rights in general that 'the uncivilized inhabitants of any country have but a qualified Dominion over it, or a right of occupancy only, and that until

> they establish a settled form of Government and subjugate the ground to their own uses by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason that they have not themselves any individual property in it."

The plaintiffs take issue with much of this, referring to the decision of the United States Supreme Court in **Mitchell v. U.S.** (1834) 9 Pet. 711 , where it was stated at p. 746:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the clear fields of the whites."

Blackburn J. in **Milirrpum,** at p. 134 called this statement in **Mitchell** the "high water mark of support for the status of Indian occupancy" but he goes on to comment that, notwithstanding the eloquence of the dicta, there are no cases where Indians were able to uphold their right as if it were a fee simple.

By his Commission and Instructions Governor Blanshard was authorized to establish a General Assembly of the inhabitants "owning twenty or more acres of freehold land." In point of fact, however, control of the land of the colony rested with the Company which regarded itself as the agent or the Crown for such purpose.

Between 1850 and 1854, with the approval of the Committee of the Company in London, Douglas entered into several agreements (some of them on one memorable all-night negotiation), which qualify as treaties with several Indian tribes or bands mainly in the vicinity of Victoria but also extending up-Island. The first 11 treaties were completed in 1850 and 1852 which was before Douglas became governor of the Colony. There is no indication he was acting on instructions from the Colonial Office, or that it was informed of his activities in this connection. The following is typical of the language of these treaties:

> "Swengwhung Tribe — Victoria Peninsula, South of Colquitz Know all men that we, the chiefs and people of the family of Swengwhung, who have signed our names and made our marks to this deed on the thirtieth day of April, one thousand eight hundred and fifty, do consent to surrender, entirely and for ever, **to James Douglas, the agent of the Hudson's Bay Company** in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between the Island of the Dead, in the Arm or Inlet of Camosun, where the Kosampsom lands terminate, extending east to the Fountain Ridge, and following it to its termination on the Straits of Juan de Fuca, in the Bay immediately east of Clover Point, including all the country between that line and the Inlet of Camosun. The condition of our understanding of this sale is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, **becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.** We have received, as payment, Seventy-five pounds sterling. In token whereof, we have signed our names and made our marks, at Fort Victoria, on the thirtieth day of April, one thousand eight hundred

> and fifty. (Signed) Snaw-nuck his x mark, and 29 others." (Ex. 1039-23, p.6)

By this time Governor Blanshard had arrived in the colony. No laws relating to Indians were enacted during his tenure which lasted until May, 1851 when Douglas was appointed Governor. Douglas remained, however, also as Chief Factor for the Company, and he continued in both capacities until 1858. He continued, after becoming Governor, to make treaties or agreements on Vancouver Island with various Indian bands, including 6,000 acres of coal-bearing lands near Nanaimo in 1852. Meanwhile, land sales, presumably to settlers, must have been brisk as Douglas stated in the fall of 1851 that the colony had a large surplus arising from the sale of land.

During this period as well, settlement was beginning on the Mainland where Douglas, of course, had considerable influence in his capacity with the Company. In addition, there was great but short-lived excitement following the discovery of gold in the Queen Charlotte Islands which led to Douglas' appointment as LieutenantGovernor for those islands in 1853. This permitted him to license miners which was good experience for what was to come a few years later.

In 1853 Douglas reported that the colony "continues in a state of profound tranquillity." In 1854, however, he reported on the outbreak of serious hostilities in Oregon between Indians and settlers, including several massacres of American troops and settlers. These uprisings concerned him greatly both because of his long and continuing association with the Hudson's Bay Company in Oregon, where it still had establishments, and because of the possibility of these kinds of difficulties spreading northwards. This uneasy state continued through the 1850's although in January 1857 Douglas reported:

> "Peace and plenty reign throughout the settlements. Trade is rather dull, yet there is no want of employment for the labouring classes in the Colony. The native Indian Tribes are quiet and friendly in their deportment and intercourse with the settlers. In fact not a single complaint has been made against any Indian of this Colony, for the last two months."

In 1857 however, gold was discovered on the Thompson River which, Douglas wrote, was causing much excitement in Washington and Oregon, and he had no doubt "a great number of people from those territories will be attracted thither with the return of the fine weather in the spring." Accordingly he issued a proclamation dated December 28, 1857 ". . . declaring the rights of the Crown in respect to gold . . . and forbidding all persons to dig or disturb the soil in search of Gold until authorized on that behalf by Her Majesty's Colonial Government," and he sent a draft to London for approval. As the mainland was not then a part of the colony, there was no local authority to make this Proclamation, but Douglas did it anyway and his actions were quickly ratified.

In February 1858 there was concern that some of the followers of Brigham Young might be intending to immigrate to British Columbia. Douglas was instructed:

> "Should they apply for admission to occupy any portion of the North Western Territory peacefully and as a community or in scattered communities; you will remember that the soil of this territory belongs to the Crown subject only to such rights as may be recognized in the Indian tribes (who are not authorized to part with the soil without permission of the Crown) and to the trading rights of the Company." (Ex. 1039-39)

In the same dispatch, however, Douglas was instructed that while no rights of occupation whatsoever were to be granted to Mormons as a group, it was added:

> "If, however, individuals or families, flying from Utah, should peacefully apply for admission into Vancouver's Island, the case is different... The acquisition of land for purposes of settlement under the ordinary rules (and subject of course to the law of the islands to naturalization) is not in the view of Her Majesty's Government to be refused, merely because the parties applying have been members of that territorial community against which the arms of the United states are now directed ... Polygamy is not tolerated etc...."

It seems clear that, in the view of the Colonial office, the rights of the Indians, whatever they may have been, did not preclude opportunities for settlement upon the lands of the Colony.

In April, Douglas reported more fully, explaining that most of the gold from the Thompson River findings had been discovered and exploited by Indians who had produced about 800 ounces, and who, by force of numbers, had been able to keep most whites out of this activity. Douglas reported that he expected "affrays and collisions with the whites" as their numbers increased, particularly "adventurers from Vancouver's Island and the United States." He predicted that sooner or later the intervention of Her Majesty's government would be required to maintain peace. Douglas also reported the Indians had recently discovered a valuable deposit of gold on the banks of the Fraser above and below the "forks" (presumably the forks of the Fraser and Thompson Rivers).

In May 1858 a command of about 400 United States soldiers was attacked while crossing a river and routed with a loss of 53 troops by a group of 1,500 Indians near the junction of the Snake and Columbia Rivers. This came to Douglas's attention at a time when he experienced some similar and potentially dangerous circumstances at Hill's Bar. His report to Lord Stanley on June 10, 1858 said:

> "My own opinion is, that the stream of immigration is setting so powerfully towards Fraser's River that it is impossible to arrest its course, and that the population thus formed will occupy the land as squatters, if they cannot obtain a title by legal means. I think it therefore a measure of obvious necessity that the whole country be immediately thrown open for settlement, and that the land be surveyed, and sold at a fixed rate, not to exceed twenty shillings an acre. By that means, together with the imposition of a Customs' duty on imports, a duty on licences to miners, and other taxes, a large revenue might be collected for the service of Government." (Ex. 1039-1, p. 13)

Possibly because he had just received a copy of an American newspaper report of the difficulties just mentioned, he wrote again on June 15:

> "On the arrival of our party at 'Hill's Bar,' the white miners were in a state of great alarm on account of a serious affray which had just occurred with the native Indians, who mustered under arms in a tumultuous manner, and threatened to make a clean sweep of the whole body of miners assembled there.
>
> The quarrel arose out of a series of provocations on both sides, and from the jealousy of the savages, who naturally feel annoyed at the large quantities of gold taken from their country by the white miners.

> I lectured them soundly about their conduct on that occasion, and took the leader in the affray, an Indian highly connected in their way, and of great influence, resolution, and energy of character, into the Government service, and found him exceedingly useful in settling other Indian difficulties.
>
> I also spoke with great plainness of speech to the white miners, who were nearly all foreigners, representing almost every nation in Europe. I refused to grant them any rights of occupation to the soil, and told them distinctly that Her Majesty's Government ignored their very existence in that part of the country, which was not open for the purposes of settlement, and they were permitted to remain there merely on sufferance; that no abuses would be tolerated; and that the laws would protect the rights of the Indian, no less than those of the white man.
>
> The recent defeat of Colonel Steptoe's detachments of United States troops, consisting of dragoons and infantry, by the Indians of Oregon territory, has greatly increased the natural audacity of the savage, and the difficulty of managing them. It will require, I fear, the nicest tact to avoid a disastrous Indian war." (Id. p. 16)

Needless to say, colonial officers regarded much of the foregoing as "a dangerous state of things." They would have preferred to issue a Lieutenant-Governor's Commission but there was a legal impediment to that course which required the passage of a Bill which was before Parliament. On July 1, 1858 Lytton wrote to Douglas, with reference to the influx of miners, and the interest of the Hudson's Bay Company, that nothing must be done which would be:

> ". . . prejudicial to the establishment of Civil Government in the country lying near the Fraser's River, and . . . All claims and interests must be subordinated to that policy which is to be found in the peopling and opening up of the new country, with the intention of consolidating it as an integral and important part of the British Empire." (Id. p. 41)

By this time a decision had been made to create a new colony. In the proceedings of the House of Commons on July 8, 1858, the Colonial Secretary made it clear that the purpose was ". . . to establish a settled form of government in that part of British North America to which circumstances were directing the steps of large bodies of men." It was further stated that, "there [was] now a stream of adventurers setting in towards that part of the world, and therefore it was indispensable that some steps should be taken to establish a settled form of law."

Some fairly strong language was used in Parliament to describe these:

> ". . . settlers so wild, so miscellaneous, perhaps so transitory, and in a form of society so crude . . . a motley inundation of immigrant diggers, of whose antecedents we are wholly ignorant, and of whom perhaps, few, if any, have any intention to become resident colonists and British subjects." . . .
>
> "It was most important there should be a strong Executive to control the Indians, and to prevent the white settlers from molesting them. The right Hon. Gentleman had adverted to the soil and climate of the country, the excellence of which is was impossible to deny, and he (Mr. Labouchiere, a former Colonial officer) believed that in the

> course of time Vancouver's Island and the adjacent territories were destined to be the homes of a large, industrious and flourishing population." (Hansard, July 8, 1858, p. 1102-08).

In a Dispatch dated July 16, 1858, Lord Lytton advised Douglas that a bill was in progress through Parliament to remove obstacles to the creation of a "Government suited to the exigencies of so peculiar a case, over the territory now resorted to . . . by multitudes whom the gold digging on Fraser's River have attracted." The bill was proposed to appoint him Governor "in conjunction with your separate Commission as Governor of Vancouver's Island", and that the Crown proposed to sever its connection with the Hudson's Bay Company and to resume the "grant of the soil."

In the meantime, Douglas was acting almost on his own by issuing Regulations described in his July 26, 1858 dispatch designed to control, if possible, "the practice of squatting on Crown land, or the lawless occupation of a country."

On July 31, 1858, anticipating the passage of the enabling legislation creating a new mainland colony, Lord Lytton sent an important dispatch to Douglas informing him that the Queen had been pleased to name her new colony "British Columbia" and he went on to express a number of views, two of which are significant indicators of the views the Imperial Government took towards its new colony.

First he commented upon the prospects for settlement. He said:

> "This territory combines, in a remarkable degree, the advantage of fertile lands, fine timber, adjacent harbours, rivers, together with rich mineral products. These last, which have led to the large immigration of which all accounts speak, furnish the Government with the means of raising a Revenue which will at once defray the necessary expenses of an establishment.
>
> The disposal also of public lands, and especially of town lots, for which I am led to believe there will be a great demand, will afford a rapid means of obtaining funds applicable to the general purposes of the Colony.
>
> I have informed you in my Dispatch of 30th instant, that a party of Royal Engineers will be dispatched to the Colony immediately. It will devolve upon them to survey those parts of the country which may be considered most suitable for settlement, to mark out allotments of land for public purposes, to suggest a site for the seat of Government, to point out where roads should be made, and to render you such assistance as may be in their power, on the distinct understanding, however, that this force is to be maintained at the Imperial cost for only a limited period, and that, if required afterwards, the Colony will have to defray the expense thereof."

Secondly Lord Lytton spoke of the humane treatment of the Indians. He said:

> "I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them.
>
> Let me not omit to observe, that **it should be an invariable condition, in all bargains or treaties with the Natives for the cession of lands possessed by them,** that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's

> Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of Civilization among the Natives." (my emphasis) (Ex. 1039-40)

I add the emphasis to the above quote because it raises again the ambiguity and problem of definition that is so important in this connection regarding what lands are to be considered in possession of the Indians. Hall J. in **Calder** raised this question and answered it by suggesting that these words mean the Indians must have had something to cede. But with respect, that does not identify the lands which were in the possession of the Indians, nor the nature of their interest, if any. It could hardly refer to the whole country or to an interest which would interfere with the ongoing settlement of the proposed new colony.

In his reply dated October 11, 1858, before he received his Commission and Instructions which I shall mention in a moment, Douglas wrote:

> "I shall not fail to give the fullest scope to your humane consideration for the improvement of the native Indian tribes, and shall take care that all their civil and agrarian rights be protected. I have in fact already taken measures, as far as possible, to prevent collisions between those tribes and the whites, and have impressed upon the miners the great fact that the law will protect the Indian equally with the white man, and regard him in all respects as a fellow subject. That principle being admitted will go far towards the well-being of the Indian tribes, and securing the peace of the country." (Ex. 1184-16).

On Aug. 14, 1858 Lord Lytton sent still another dispatch in which he authorized Douglas to sell land for agricultural purposes "wherever a demand for it shall arise," but he cautioned against selling land for town purposes until it has been surveyed, or ready for survey, and then only at a high upset price of at least £1 per acre so as to discourage speculation.

Some time prior to September 2, 1858 Lord Lytton received a communication from the Aborigines Protection Society (of England) expressing serious concern about the possibility of hostilities between Indians and American miners on Fraser's River, and asserting Native title greater than that of the "English Government or foreign adventurers." Without adopting the views of the Society, this communication was sent to Douglas for his comments.

In view of these and other pronouncements from both sides of the world, and in view of the obvious intention of the Crown to encourage the early settlement of the proposed new colony, I conclude that these references must be construed to refer to lands actually possessed by the Indians, (that is their villages and cultivated fields, etc.).

In these circumstances, Douglas was made Governor of the new colony while continuing in that post on Vancouver Island with extraordinary powers to make laws. In **A.G.B.C. v. A.G. Can., (Deadman's Island Case)** [1906], A.C. 552 (J.C.P.C.), Viscount Dunedin said on this question:

> "... As to his powers, it may at once be said they were absolutely autocratic; he represented the Crown in every particular, and was, in fact, the law. At the same time careful dispatches were sent to him by the Colonial Minister of the day laying down in explicit terms the methods of administration which it was desired he should follow."

The foregoing reflects the language of the **Imperial Act to Provide for the Government of British Columbia,** dated August 2, 1859 which provided:

> "It shall be lawful for Her Majesty, by any Order or Orders to be by Her from time to time made, with the advice of Her Privy Council, to make, ordain, and establish, and (subject to such conditions or restrictions as to Her shall seem meet) to authorize and empower such officer as She may from time to time appoint as Governor of British Columbia to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein; provided that all such Orders in Council, and all laws and ordinances so to be made as aforesaid, shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively."

That Act also empowered the Crown to constitute a legislature "to make laws for the peace order and good government of [the colony]," which did not occur until 1864. The Act creating the colony is dated August 2, 1858 but the Governor's Commission and Instructions are not dated until September 2, 1858. These important documents make no mention of Indians or Indian lands even though it was believed from the evidence of Sir George Simpson in Parliament the previous year that they were warlike and difficult to manage, and numbered about 80,000 west of the Mountains.

Mr. Rush offered an interesting argument based not on the Governor's Instructions but rather upon his Commission which precluded him from making "... any law of an extraordinary nature and importance whereby our prerogative, or the rights and property of our subjects residing in our said colony ... may be prejudiced." He argues from this that the Governor had no power to make any law which would extinguish aboriginal interests of the Indians who were subjects of the Crown.

This argument presupposes aboriginal interests are not subject to extinguishment whereas it seems incontestable that they were extinguishable at the option of the Crown. The contrary has never been suggested in any of the Canadian authorities such as **St. Catherines Milling, Calder** and **Sparrow.** In any event, as will be shown, most of the Colonial legislation was also enacted by the Imperial Parliament.

Upon receiving Lytton's July 1st dispatch, Douglas responded on October 12, 1858 about what he had done at Fort Hope with a view to settlement. He said:

> "Having just ascertained, from your Dispatch of the lst of July last, that it was the wish of Her Majesty's Government to colonize the country and develop its resources, I proposed to the inhabitants of the place to lay out certain lands as a town site, and to grant a right of occupation for town lots, under a lease terminable at the pleasure of the Crown, and to be held at a monthly rental of 41s. 8d. sterling, payable in advance, and with the understanding that the holder would be allowed a pre-emption right of purchase when the land is sold, in which case the sum of monthly rent paid would be considered as part of the purchase money."

In another dispatch dated Oct. 12, 1858, Douglas described difficulties encountered on a visit to Hope where he found the Indians "much incensed" against the miners, and after hearing their complaints, "irresistibly [concluded] that the improper use of spirituous liquors had caused many of the evils they complained of."

He accordingly issued a proclamation establishing the offence of giving or selling spirituous liquors to Indians which he said he thought would be "of great advantageous to the whites and Indians." We shall never know if this was a wise or unwise decision. Certainly he thought it salutary, but it was also patronizing and discriminatory, and a foreshadowing of things to come.

In the same dispatch Douglas also reported on his activities at Yale as follows:

> "We found a large assemblage of people at Fort Yale expecting our arrival with some anxiety, in order to ascertain the views of Her Majesty's Government.
>
> According to their earnest request I met them the following day at a public meeting, and delivered a short address, in which I announced the instructions I had received from Her Majesty's Government, as contained in your Despatch of the lst of July last, and the tidings were received with satisfaction.
>
> The same process of organization was gone through here as at Fort Hope. The Indians were assembled, and made no secret of their dislike to their white visitors. They had many complaints of maltreatment, and in all cases where redress was possible it was granted without delay. One small party of those natives laid claim to a particular part of the river, which they wished to be reserved for their own purposes, a request which was immediately granted, the space staked off, and the miners who had taken claims there were immediately removed, and public notice given that the place was reserved for the Indians, and that no one would be allowed to occupy it without their consent.
>
> A town site was also marked out at Fort Yale, and leases of town lots issued to all persons desirous of settling and building there, upon the same conditions and at the same charge as the town lots disposed of at Fort Hope.
>
> Several spirit licences were also issued, to check the profuse and illegal sale of ardent spirits . . .
>
> Information was received from Victoria, during my stay at Fort Yale, that some speculators, taking advantage of my absence, had squatted on a valuable tract of public land near the mouth of Fraser's River, commonly known as the site of old Fort Langley, and employed surveyors at a great expense to lay it out into building lots, which they were offering for sale, hoping by that means to interest a sufficient number of persons in the scheme as would overawe the Government and induce a confirmation of their title. To put the public upon their guard, and to defeat a swindling scheme, which, if tolerated, would give rise to other nefarious transactions of the same kind, I thought it necessary to issue a proclamation, of which a copy is transmitted, warning all persons that the Crown lands in that part of the country had not been alienated or in any way encumbered, that any persons making fraudulent sales of land appertaining to the Crown, would be punished as the law directs, and persons holding such lands would be summarily ejected.

> That proclamation was immediately forwarded to Victoria and published, with so decided effect on the public mind as entirely to break up the scheme, and we are now laying off the site of Old Fort Langley in town lots, to be sold for account and for the benefit of the public revenue." (Transcript, p. 27,695 to 27,696)

On November 5, 1858 Douglas responded to the letter of the Aborigines Society which had been sent to him by Lord Lytton on September 2nd. He replied:

> "While you do not wish to be understood as adopting the views of the Society as the means by which that may be best accomplished, you express a wish that the subject should have my prompt and careful consideration, and I shall not fail to give the fullest effect to your instructions on that head, as soon as the present pressure of business has somewhat abated. I may, however, remark that the native Indian tribe are protected in all their interests to the utmost extent of our present means." (Ex. 1039-2 p. 23)

Upon receipt of his Commission and Instructions Governor Douglas quickly issued three Proclamations, which is the way he was able to legislate. First he revoked the exclusive license of the Hudson's Bay Company; secondly he granted an indemnity to Colonial Officers for acts previously done; and thirdly he declared, effective November 19, 1858, that the Laws of England except where inapplicable because of local circumstance, were to be the laws of the Colony.

Apparently relating his views to the law of England where all land belongs to the Crown, Begbie J. (as he then was) advised the Governor:

"... the title of the Crown can only be conveyed by Letters Patent under the Great Seal, or under the authority of an Act of Parliament." He accordingly advised a proclamation empowering some person or persons to convey the legal estate in Crown Lands."

This was done on December 2, 1858 when by proclamation Douglas authorized "the Governor, for the time being of the Colony ... to grant to any person or persons any land belonging to the Crown in the said Colony". This Proclamation **(Calder I, Ex. 1185-1)** is the first of 13 colonial enactments upon which the province relied in **Calder** as evidence of the extinguishment of all Indian interests which may have existed at the time the colony was established. I shall discuss the question of extinguishment as a separate subject later.

On December 30, 1858 Lytton enquired of Douglas whether "... it might be feasible to settle [the Indians] permanently in villages; [where] civilization at once begins". He pointed out that such had been accomplished with the Kaffirs at the Cape.

Governor Douglas was not able to reply to this enquiry until March 14, 1859 when he made these remarks:

> "The plan followed by the Government of the United States, in making Indian settlements, appears in many respects objectionable; they are supported at an enormous expense by Congress, which for the fiscal year ending June 30, 1856, granted the sum of 358,000 dollars for the support and maintenance of the Indians of California alone, and for the four years ending with the 30th June 1858, the total expenditure for that object came to the large sum of 1,104,000 dollars, and notwithstanding the heavy outlay, the Indians in those settlements are rapidly degenerating; neither would I recommend the system pursued by the founders of the Spanish missions in California.

> Their objects, though to a certain extent mercenary, were mainly of a benevolent kind; the Indians were educated and trained in the Roman Catholic faith; they were well fed and clothed, and they were taught to labour; but being kept in a state of pupillage, and not allowed to acquire property of their own, nor taught to think and act for themselves, the feeling and pride of independence were effectually destroyed; and not having been trained to habits of self-government and self-reliance, they were found, when freed from control, altogether incapable of contributing to their own support, and really were more helpless and degraded than the untutored savages.
>
> With such beacons to guide our steps, and profiting by the lessons of experience so acquired, we may perhaps succeed in escaping the manifest evils of both systems; the great expense and the debasing influences of the American system, by making the Indians independent and the settlements self-supporting; and to avoid the rock on which were wrecked the hopes of the Spanish missions, I think it would be advisable studiously to cultivate the pride of independence, so ennobling in its effects, and which the savage largely possesses from nature and early training.
>
> I would, for example, propose that every family should have a distinct portion of the reserved land assigned for their use, and to be cultivated by their own labour, giving them however, for the present, no power to sell or otherwise alienate the land; that they should be taught to regard that land as their inheritance; that the desire should be encouraged and fostered in their minds of adding to their possessions, and devoting their earnings to the purchase of property apart from the reserve, which would be left entirely at their own disposal and control; that they should in all respects be treated as rational beings, capable of acting and thinking for themselves; and lastly, that they should be placed under proper moral and religious training, and left, under the protection of the laws, to provide for their own maintenance and support." (Ex. 1039-2 p. 69).

In the meantime, on February 5, 1859 Douglas informed the House of Assembly that the Indians:

> ". . . were to be protected in their original right of fishing On the coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown lands; and they were also to be secured in the enjoyment of their village sites and cultivated fields.
>
> These rights they have since enjoyed in full and the Reserves of land covering their Village sites and cultivated fields have all been distinctly marked on the maps and surveys of the Colony, and the faith of Government is pledged, that their occupation shall not be disturbed. (Ex. 1039-37)

It is difficult to read these words without wondering what went wrong for one would think that such a policy, if fairly implemented, would result in Indians having a safe haven in their village and reserves, the use of all vacant Crown land, and opportunities for betterment in the new economy that would place them in a preferred position to enjoy the best of both their own and the white civilization. I shall continue to wonder what went wrong throughout the course of this judgment.

On February 14, 1959, Governor Douglas issued a Proclamation, (**Calder II, Ex. 1185-10**), being Regulations "... respecting the alienation and possession of agricultural lands, and lands proposed for the sites of towns in British Columbia ..." etc. in which it is declared, in s. 1:

> "1. All the lands in British Columbia, and all the Mines and Mineral therein, belong to the Crown in fee."

The province relies upon these provisions as the clearest possible evidence that the Crown had in fact and in law taken title to and full control of all of the lands of the colony. Lord Lytton, in a dispatch dated April 11, 1859, said:

> "... In the case of the Indians of Vancouver's island and British Columbia, Her Majesty's Government earnestly wish that when the advancing requirements of colonization press upon lands occupied by members of that race, measures of liberality and justice may be adopted for compensating them for the surrender of the territory which they have been taught to regard as their own."

This suggests again, that the Colonial Office did not consider the Indians entitled to interests which were incompatible with the orderly development of the colony. I am not able to say whether Lord Lytton expected the colony to make cash payment for the surrender of interests, or merely the allotment of reserves, or both.

The Governor also issued new (or revised existing) mining laws, Customs and an Aliens Act. In a report to London dated June 18, 1859, he enclosed a Report made by Begbie J., who had just returned from the circuit he had just undertaken via the Fraser as far as the Fountains near Lillooet and returning by way of the Harrison River to Langley. He reported a great preponderance of California or "Californianized" elements of the population and a ready submission of the populace to the will of the Executive when such was expressed clearly. He also noted the great riches of the country, both auriferous and agricultural, and the great want for "... fixity of tenure for agricultural purposes".

In June 1859 the Duke of Newcastle succeeded Lord Lytton as Colonial Secretary.

On July 4, 1859 Governor Douglas made his intention plain in a dispatch to London. He said:

> "The regular settlement of the country by a class of industrious cultivators is an object of the utmost importance to the colony, which is at present dependent for every necessity of life, even to the food of the people, on importation from abroad ...
>
> We are for that reason most anxious to encourage the actual settlement of the country, and that the process should commence on the sea coast, and spread from thence, as much as possible, continuously along the course of the great rivers into the interior ...
>
> Colonel Moody is making great efforts to bring surveying parties rapidly into the field, but the survey of the site of Queensborough, and other necessary work, has led to unavoidable delays, and no country land has as yet been brought into market. There is much popular clamour on that account, and should the pressure for land be great, I think it will be advisable to meet the emergency by establishing some

> temporary system of occupation, which would enable settlers to hold and improve certain specified tracts of land under a pre-emption right until the surveys are completed, when it might cease to be in force." (Ex 1039-41).

The Governor said more or less the same thing over and over again, with a view to persuading his superiors in London that it was not feasible in this new country to hold land back from settlers until after it had been surveyed.

In the summer of that year Governor Douglas made a tour into the interior and in a report to London dated October 18, 1859 he stated that the entire white population of British Columbia probably did not exceed 5,000 men, with few families, and that there were neither wives nor children "to refine and soften by their presence, the dreariness and asperity of existence." He also commented upon the lack of interest in country land, as it was called, but he encountered settlers at Hope and Yale who were interested in unsurveyed land but required some security. Douglas accordingly proposed to London:

> "... to permit all persons being at the time British subjects, and all persons who have recorded their intention of becoming British subjects, to hold tracts of unsurveyed Crown land, not being town sites, **nor sites of Indian villages,** and not exceeding 160 acres in extent, with a guarantee that the same would be fully conveyed to the holder when the land is surveyed, at a price not to exceed 10s. an acre." (My emphasis).

It is apparent that the differing opinions of Douglas and the Colonial Office about selling unsurveyed land was impeding settlement in the mainland colony. His original instructions had been not to alienate land without prior survey, but those in London did not understand or appreciate the difficulties of surveying such a vast and difficult country. Douglas believed that he had tacit permission to proceed with arrangements permitting occupation without survey.

On January 4, 1860 the Governor issued a further land Proclamation **(Calder III, Ex 1187-1)**, to permit the pre-emption of unsurveyed agricultural land by British subjects "... not being the site of an existent or proposed town, or auriferous land available for mining, **or an Indian Reserve or Settlement ..."** S. 17 permitted any magistrate to summarily resolve any disputes about any land so taken. (My emphasis).

This Proclamation was sent to London on January 12, 1860 with a dispatch in which Douglas said:

> "The object of the measure is solely to encourage and induce the settlement of the country; occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition.
>
> The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, **Indian Settlements ...**, and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance to him, of being allowed to choose for himself and enter at once into possession of land without expense or delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.

> Other good effects are expected to result from the operation of the Act; there is, for example, every reason to believe that it will lead to the more rapid colonization of the country, and to greater economy in its survey, which can be effected hereafter, when roads are made, at a much smaller cost for travelling and conveyance than at the present time." (My emphasis). (Ex. 1187-13).

This Proclamation did not receive easy or early approval in London as had been the case with **Calder I and II.** The reasons for this included the fact that the Colonial Office had experienced bad results in other colonies allowing settlers onto unsurveyed land and it accordingly referred the Governor's proposal to the Land and Immigration Commissions for study. In addition, a Captain Clark, who had some experience in Australia, had sent a letter to the Colonial Office making suggestions for the disposition of land in British Columbia. Captain Clark assumed that "... no claims have arisen to the soil of British Columbia excepting isolated claims of the Hudson's Bay Company ... and that no Indian title exists of if any that it has been extinguished, and separate provision made for them."

The Duke of Newcastle, after receiving the reluctant approval of the Land and Immigration Commissions allowed the Proclamation to be laid before Parliament, but declined to proceed with it pending a reply from the Governor regarding Captain Clark's proposal.

In April 1860, in response to a request for a grant of land for the establishment of a mission near present Prince Rupert, the Governor suggested in a dispatch to the Duke of Newcastle a policy which may have been his own idea or which he may have borrowed from the **Royal Proclamation, 1763.** This policy was that mission lands and Indian reserves should be conveyed to the Governor in trust so that they could not sell them.

The Duke of Newcastle replied on May 25 approving the grant, including the suggestion that the mission land be conveyed to the Governor in trust, but he did not comment on the Indian question.

Meanwhile, also in April 1860, Begbie J. had submitted a long report with some interesting observations about the state of the colony, and about land matters which may be summarized as follows:

(1) the [white] population was "nearly all aliens," with perhaps one-sixth probably British subjects from Britain or the other provinces, and the remainder adopted citizens of the United States, having been born in Europe and a total varying from 1,200 to 6,000 or 7,000. He commented that there was, in addition to the Indians, two diverse ethnic groups, "Chinamen" and negroes, "both despised ... by the prevalent white races, who are most strongly imbued with the Unites States notions on the score of colour and race."

(2) "The native Indian tribes are numerous very brave very patient and very intelligent; willing to work hard at some description of labour."

(3) that any land law would have to be designed with a view to the multifariousness of the various races "who are to be governed by one rule ... to which they will all submit: for if they refuse, or are disgusted, it would be difficult to coerce, and plainly impossible to detain them."

(4) the present system, described as the law proclaimed January 4, 1860, with which Begbie J. said he did not wholly agree was described as follows:

> "1. Town lands and suburban lands can only be sold by auction: or after having been offered at auction in vain, then to any applicant, at the upset price and on the terms and conditions &c of the auction: treating in fact the subsequent purchaser as a bidder on the day of auction.
>
> 2. All other lands **except Indian and Government reserves** may before survey be sold either (a) to pre-emptors, staking out such a parcel as they may select, not exceeding 260 acres . . ."

(5) Begbie J. went on to say that he preferred to codify the land system in many respects, particularly to define town and suburban sites and ". . . what are the definite situation of Government and Indian reserves. Until this is done, (and all but the Indian may be very shortly defined) nobody can be quite certain what unsurveyed lands are open . . ."

**(6) with respect to S. 1. he said "I may also observe that the Indian title is by no means extinguished. Separate provision must be made for it, and soon: though how this is to be done will require some consideration. From the friendly intercourse with the natives, however, no serious difficulty is to be apprehended."**

(7) that he had completely changed his mind since coming to the colony, from believing that land should not be opened up for occupation before survey and sale to the view that such a scheme was impossible and impolitic.

(8) After describing "boundless" grazing lands both east and west of the Cascades, he also expressed the view that:

> "The absolute right of the Crown in all these lands is perfectly recognized and I am happy to say that great confidence in the honour of the Government is shown by all parties." (Ex. 1187-30) (my emphasis)

This leads me to conclude that Begbie J. could not have believed the Indians of the Colony owned the soil of the province, nor did they have an interest which stood in the way of settlement even though he believed some accommodation should be made with them. I am puzzled by his suggestion that he apprehended no serious difficulty in connection with "Indian title." He was not ordinarily given to naivety and he recognized some consideration would be required.

On August 24, 1860, the Governor damned the Clark Memo with faint praise but he did not mention the question of Indian "title" although he included a copy of the report of Begbie J. Briefly, Governor Douglas recommended against any change in his January 4, 1860 **"Pre-Emption Act"** until it had been tested.

Immediately after that Douglas embarked upon a tour of the interior. In a dispatch dated October 9, 1860 he described a visit to the Lillooet area where he noted an Indian reserve had been established. He received an "address" at Cayoosh (near Lillooet) the object of which was ". . . to urge the early sale of town lots . . .protection for the Chinese miners, and the removal of stake nets and all obstructions ... preventing the ascent of salmon ...,"

In the same dispatch the governor advised:

> "I had an opportunity of communicating personally with the native Indian tribes, who assembled in great numbers at Cayoosh during my stay. I made them clearly understand that Her Majesty's Government felt deeply interested in their welfare, and had sent instructions that they should be treated in all respects as Her Majesty's other subjects; and that the local magistrates would attend to their complaints, and guard them from wrong, provided they abandoned their own barbarous modes of retaliation, and appealed in all cases to the laws for relief and protection. I also forcibly impressed upon their minds that the same laws would not fail to punish offenses committed by them against the persons or property of others.
>
> **I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony;** and that on their becoming registered free miners they might dig and search for gold, and hold mining claims on the same terms precisely as other miners: in short, I strove to make them conscious that they were recognized members of the commonwealth, and that by good conduct they would acquire a certain status, and become respectable members of society. They were delighted with the idea, and expressed their gratitude in the warmest terms, assuring me of their boundless devotion and attachment to Her Majesty's person and crown, and their readiness to take up arms at any moment in defence of Her Majesty's dominion and rights. ...
>
> The Indians mustered in great force during my stay at Lytton. My communications with them were to the same effect as to the native tribes who assembled at Cayoosh, and their gratitude, loyalty, and devotion were expressed in terms equally warm and earnest." (My emphasis). (Ex. 1142-4).

From Lytton the Governor travelled on to the Similkameen and then to Rock Creek, a mining centre near Midway. In a later dispatch dated October 25, 1860, Governor Douglas reported on meetings and other matters at various locations during his journey. He said:

> "With the exception of the miners assembled on Thompson River at Rock Creek and Similkameen, the part of British Columbia through which my route lay, is still exclusively occupied by the native Indian tribes, a race of bold and active hunters, forming, when mustered in force on their hardy native horses, an imposing array. I fell in with detachments at different points of the route, where they had assembled to offer a rude but cordial welcome ...
>
> There was one subject which especially pre-occupied their minds, as I discovered by the frequent allusions they made to it, namely, the abject condition to which the cognate native tribes of Oregon have been

> reduced by the American system of removing whole tribes from their native homes into distant reserves, where they are compelled to stay, and denied the enjoyment of that natural freedom and liberty of action without which existence becomes intolerable. They evidently looked forward with dread to their own future condition, fearing lest the same wretched fate awaited the natives of British Columbia.
>
> I succeeded in disabusing their minds of those false impressions by fully explaining the views of Her Majesty's Government, and repeating in substance what I have in a former part of this report informed your Grace was said on the same subject to the assembled tribes at Cayoosh and Lytton.
>
> An appalling Indian outrage committed in the neighbouring State of Oregon, as related with its attendant horrors in a slip enclosed herewith from the 'Vancouver Chronicle,' will show better than comment the impolicy of the American system, and how careful we should be in guarding against the contagion of evil example, by treating the natives with justice, and removing when necessary, every cause of distrust as to the ultimate views and policy of Her Majesty's Government with respect to them." (Ex 1142-4, p. 27).

The "outrage" in Oregon referred to an Indian massacre of a wagon train where 45 of 46 men, women and children were said to have been "butchered" with only one man managing to escape. In his acknowledgment of these reports dated February 1, 1861, the Duke of Newcastle expressed no disagreement with anything the Governor had said.

On December 6, 1860 the Duke of Newcastle conveyed approval of the **Act,** and it was subsequently passed by the Imperial Parliament and received Royal Assent.

The province argues that this **Act (Calder III)** is the most comprehensive land law proclamation made during the colonial period (1858 until Federation with Canada in 1871). Its provisions made it impossible to conclude the officials in the colony and in Great Britain believed there was any "Indian" impediment to the settlement of the Colony.

There was, however, agitation on Vancouver Island to extinguish aboriginal "title." In March 1861 Douglas forwarded to the Duke of Newcastle a petition from the House of Assembly in Victoria requesting funds to extinguish these interests in certain lands in the Colony of Vancouver Island. In his letter of transmittal Douglas noted that the natives expected settlement would proceed only with their consent, and that failure to make proper arrangements might result in a clear and imminent public danger:

> "... As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain Districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary Tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government, that would endanger the peace of the Country ...
>
> "3 — Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land in every case prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company's Charter and the want of funds, it has not been in my power to continue it. Your

> Grace must indeed be well aware that I have since then had the utmost difficulty in raising money enough to defray the most indispensable wants of government. . . .
>
> "6 — I will not occupy Your Grace's time by any attempt to investigate the opinion expressed by the House of Assembly as to the liability of the Imperial Government for all expenses connected with the purchase of the claims of the aborigines to the public land, which simply amounts to this, that the expense would in the first instance be paid by the Imperial Government, and charged to the account of proceeds coming (?) from the sales of public land. The land itself would therefore be ultimately made to bear the charge.
>
> "7 — It is the practical question as to the means of raising the money that at this moment more seriously engages my attention. The Colony being already severely taxed for the support of its own government, could not afford to pay that additional sum; but the difficulty may be surmounted by means of an advance from the Imperial Government to the extent of 3,000 pounds, to be eventually repaid out of the Colonial Land Fund . . .
>
> And I shall carefully attend to the repayment of the sum advanced in full as soon as the land fund recovers in some measure from the depression caused by the delay which Her Majesty's Government has experienced in affecting a final arrangement with the Hudson's Bay Company for the reconveyance of the Colony, so there is little doubt when our new system of finance comes fully into operation that the revenue will be fully adequate to the expenditure of the Colony.

The request for aid in financing purchase of aboriginal interests was reviewed by the Emigration Office in London. Every one of the written minutes concerning this matter expressed concurrence with Douglas and the House of Assembly in Victoria regarding the advantages of purchasing aboriginal "title". Further, it is clear that the need to purchase these interests was seen as necessary not only in the Colony of Vancouver Island, but in the mainland colony of British Columbia, as well.

The following minute of the Colonial office illustrates the point:

> "Mr. Elliot. The early settlement of this matter is of much importance. I frequently am called upon to see at this office persons of all classes, desirous of settling in V.C. Isld. or B. Columbia, and one of the questions proposed to me is generally how the claims of the natives to land were arranged; to which I have had to ans. that I concluded they wd. have to be bought up. But this has not been quite satisfactory to an enquiring settler, who, before he leaves these shores naturally desires to know exactly & positively what he may expect in the acquisition of land in the Colony he has selected as his residence. Therefore if these Indian claims cd. be fairly extinguished the arrangement wd. facilitate immigration. But buying them by means of a loan from the British Exchequer is probably questionable. I do not see why a loan sh. not be raised in the Colony, the amount wanted being only £3000. It is, however, to be observed that the Colony has lately borrowed £10,000 for harbour improvements.

The transmittal letter from Helmcken, speaker of the House of Assembly, to Governor Douglas refers to the Petition: "Praying for the extinction of the aboriginal title" passed by the House of Assembly.

The Petition sent to the Colonial Office provided in part:

> "We, Her Majesty's faithful and loyal subjects, the members of the House of Assembly of Vancouver Island in Parliament assembled would earnestly request the attention of your grace to the following considerations:
>
> 1. That many colonists have purchased land at the rate of one pound sterling per acre in districts to which aboriginal title has not yet been extinguished.
>
> 2. That in consequence of the non-extinction of this title, these persons though most desirous to occupy and improve, have been unable to take possession of their lands purchased in most cases, nearly three years ago and of this they loudly and justly complained. . . .
>
> 3. That the House of Assembly respectfully considered that the extinction of the aboriginal title is obligatory on the Imperial Government."

The disagreement between London and Victoria concerned which government should finance this cost. The government in England declined to place this burden on the British taxpayer, claiming that the local government should raise the revenue. The local government claimed that it could not do so. The House of Assembly alleged that fiscal responsibility rested with the Home Government. Douglas, however, promised that the funds would be a loan to be repaid out of Colonial land revenues when settlers were able to pay for the land. The Emigration Office in Britain was concerned that every Colony could make a similar claim on the Home Government for assistance. There was also concern that a loan from the Treasury or the money market could only be made at disadvantageous rates at that time. There was concurrence that eventually the loan would have to be repaid by the Colony, but there was little information available regarding the status and future of land revenues in the Colony.

Part of the correspondence that was generated by the Petition was a letter from a Mr. Murdoch, one of the Land and Immigration Commissioners in London, to Sir Frederick Rogers. This acknowledges the dispatch from the Governor of Vancouver Island as well as the Petition on the subject of the extinction of the native title to lands in the Colony:

> "The Assembly represents that nearly three years ago many colonists purchased land over which the native title had not yet been extinguished, at the rate of one pound per acre: that the natives being well aware of the sums paid to other natives for the extinction of their title refused to allow the colonist to take possession of the land. That any attempt to do so by force would produce collision and render the native, who are numerous and war-like, hostile to settlers, and that the existence of the native title has deterred many persons from settling on the Island."

Murdoch went on to say:

> "The only question is the source from which the money should in the first instance be obtained. This apparently must be either from the Imperial Treasury or by a loan in the money market. But a loan for so small a sum and for a Colony so little known as Vancouver's Island, could not probably be obtained without an Imperial guarantee, except under very disadvantageous terms. Whether the money should be advanced from the Imperial Treasury is a question which belongs to the Lord Commissioners of the Treasury and I would suggest that it should be submitted to them. There cannot, of course, be a doubt that from whatever source the money is in the first instance drawn, it must eventually be paid out of land revenue of Vancouver's Island."

The opinion at the Emigration Office that the aboriginal interests should be purchased resulted in an appeal to the Treasury for fiscal assistance. This however, was turned down because of the assertion of the Victoria Legislature that the Home Government was liable for the cost of extinguishing "aboriginal title." In view of this assertion, the Lords of the Treasury took the position that the application was not for a loan, but for an outright grant.

Correspondence between Stephen Walcott (second Commissioner of the Emigration Office) and Sir Frederic Rogers (permanent Under-Secretary of State for the Colonies) dated 4th October, 1861, makes it clear that the failure to acquire funds from the Treasury was not an expression of opinion that "indian title" should not be purchased. Rather it was an assertion that the Colony was liable for the costs. Walcott reviewed the matter and proposed an alternate means of raising the needed funds:

> 1. "I have to acknowledge your Letter of the 28th ultimo on the subject of the application from the Governor of Vancouver Island for an advance of £3000 from the Imperial Government for the purpose of extinguishing the native Title to certain lands in the Colony.
>
> 2. The circumstances of the case and the importance and practical economy of extinguishing the aboriginal title on the lands in question as early as possible, are fully set forth in Mr. Murdoch's report of the 12th of June last, who recommended that the application should be submitted to the Lords Commissioners of the Treasury, as the Only question which appeared to remain open was the source from which the money should in the first instance be obtained.
>
> 3. From Mr. Peel's letter of the 25th ultimo which accompanies your Letter it appears that the Lords Commissioners of the Treasury to whom the matter had been submitted, are not prepared to purchase up the native Title at the expense of this Country, and do not view the present application as one for a loan, since the House of Assembly had asserted the liability of the Home Government to bear the charge of extinguishing the Title. Their Lordships moreover consider that the Governor's best course would be to follow his previous practice of purchasing the native rights over such land only as was immediately required for settlement, and not on so large a scale at once as to require that a loan should be raised for the purpose.
>
> 4. The Governor has however explained in his Despatch of the 25th of March, his inability to continue the practice of purchasing the Native

> title, and the great difficulty he experiences in raising sufficient money to defray the most indispensable wants of his Government. As the matter therefore now stands the Colony cannot provide the required sum, and the Home Government declines to make a grant of it. The result will be that the opportunity will be lost of extinguishing the Native Title on very moderate terms, and that faith cannot be kept with the persons to whom the Government sold the land 3 years ago without endangering the peace of the Country.
>
> 5. The only alternative which seems left that offers a prospect of solving the difficulty is that the Governor should be invested by the Local Legislature with full powers to raise a loan on the best terms he can on the security of the land and general Revenues of the Colony. This security, and distinct admission of Colonial liability, may possibly remove the objection of the Treasury (which I understand is not so much to a loan as to a grant) to guarantee so small a sum as 3000 — or if not some capitalist may be found willing to lend it on terms which, looking at the object to be obtained, it may be well worth the Colony's while to give."

Mr. Murdoch, referred to in the second paragraph above, was Chairman of the Colonial Land and Emigration Commissioners.

In the fall session of 1861 the Vancouver Island House of Assembly reopened discussion on the need to purchase aboriginal interests. No response had been received to the petition for funds which had been sent to England in March. In September, Mr. Tolmie suggested that a renewed application be made to the Home Government for funds to extinguish aboriginal interests in certain districts where settlement was proceeding.

Newcastle's response to the March petition is dated October 19, 1861. He wrote to Douglas concurring in the need to extinguish native interests, but directed that the House of Assembly would have to vote funds for that purpose:

> "I have had under my consideration your despatch No. 24 of the 25 of March last, transmitting an address from the House of Assembly of Vancouver Island in which they pray for the assistance of H.M. Government in extinguishing the aboriginal title to the Public Lands in the Colony and set forth the evils that may result from a neglect of this precaution. I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island but the acquisition of the title is a purely Colonial Interest and the Legislature must not entertain any expectation that the British Taxpayer will be burdened to supply the funds or British Credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly that they should enable you to procure the requisite means but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, while it is essential to the interests of the people of Vancouver Island, is at the same time purely *Colonial* in its character, and trifling in the charge that it would entail."

In 1863 the Legislative Council of Vancouver Island voted $9,000 for the acquisition of lands from the Cowichan and Chemainus Indians.

While there are references in the correspondence written by officials in the Colonial Office to the question of extinguishing aboriginal interests in British Columbia as well as on Vancouver Island, Governor Douglas made no further mention of it and there never was, so far as the evidence shows, any expectation or intention to do so. Agitation for treaties was limited to the separate colony of Vancouver Island.

The plaintiffs argue that the willingness of the Crown, the Hudson's Bay Company, Governor Douglas, and the Legislative Assembly of Vancouver Island to purchase aboriginal lands or interests is evidence of the existence of Indian ownership of the entire province.

With respect, I think too much has been made of these treaties as there is no clear understanding of what was involved, and the reasons which motivated the parties to act as they did. The Hudson's Bay Company apparently decided to acquire aboriginal interests in land in which it was interested, and obtained such land for a few blankets. It is not clear whether the acquired lands included village sites, or cultivated fields or surrounding hunting grounds. It did not include the whole territory. The Colony made a few additional acquisitions under obvious pressure from settlers who were concerned not just about an uncertain title, but also about their safety.

At the same time, however, (and more particularly on the mainland), the Crown was proceeding rapidly with the sale of what was styled Crown or waste or vacant land which did not include village sites, etc. Village sites were preserved for the exclusive use of Indians and it seems to have been clearly the intention of the Crown that the Indians' interest in whatever sites as they were actually using would indeed be set aside as permanent reserves.

The treaties, by their terms, are sales of land except for village sites and cultivated fields which are reserved to the Indians who also reserved the right "... to hunt over the unoccupied lands and to carry on our fisheries as formerly. I do not know if it was thought the Indians were actually in possession of those lands as adjacent hunting lands. If they were, then the treaties add nothing to the reserve system. The correspondence about "native title" on the other hand is even less precise but it certainly did not amount to a recognition of any disability on the part of the Crown to promote settlement in the colony which was well under way at the time of these exchanges, and continued after that time without abatement.

The Vancouver Island treaties may represent no more than the surrender of the Indians of whatever rights they had in exchange for the modest consideration they received together with the substitution of a treaty right to continue to use the land. It cannot be inferred that the Indians owned the land or that the Crown was obliged by law to enter into these or further treaties.

This is all so uncertain and equivocal that I am unable to attach any legal consequences to these treaties. It is not surprising, when one comes so late in the day to reconstruct history, to uncover questions to which there is no obvious answer or explanation. Such matters can neither be ignored nor assumed to have a greater significance than they deserve. I am more impressed by the unequivocal fact that the Crown, while recognizing aboriginal possession of village sites, was both setting aside reserves and marketing the unoccupied balance of the colony.

Returning to the colonial legislation, **Calder IV to IX** were enacted by the colonial government, (Douglas alone until 1864 and by the Governor and Legislative Council thereafter), which were also enacted by the Imperial Parliament. I shall mention them briefly, all of which are in Ex. 1185.

**Calder IV,** (Ex 1185) dated January 20, 1860, was a proclamation providing for the sale of town and suburban lots and surveyed agricultural lands. This was sent by Douglas to the colonial office on January 27, 1860. It was laid before the Imperial Parliament, and Douglas was informed of Her Majesty's approval on May 8, 1860.

**Calder V,** (Ex. 1185), **The Pre-Emption Amendment Act,** dated January 19, 1861, amended the January 4, 1860 proclamation (Calder III). Douglas was informed of the Queen's approval by letter dated December 30, 1861.

**Calder VI,** (Ex. 1185), dated January 19, 1861, is sometimes called the **Country Land Act.** It reduced the price of country land on pre-emption from ten shillings an acre to four shillings 2 pence per acre. Douglas was informed by letter dated December 30, 1861 of the Queen's approval.

**Calder VII,** (Ex. 1185), dated May 28, 1861, has been called the **Pre-Emption Purchase Act, 1861.** It was intended to limit speculation in pre-empted land by reducing the amount of land that a settler could hold by pre-emption to 160 acres although bona fide settlers could also purchase other lands. Douglas was informed of Her Majesty's approval on December 30, 1861.

**Calder VIII** (Ex. 1185), is dated August 27, 1861. It was called the **Pre-Emption Consolidation Act, 1861.** In his dispatch to the Colonial Office Douglas explained that its purpose was to bring within the compass of one general Act all of the several proclamations regulating the pre-emption of land, and to simplify procedures for the acquisition and registration of land by settlers. Douglas was informed of the Queen's approval by letter dated March 17, 1862.

**Calder IX** (Ex 1185), was dated May 27, 1863, and was called the **Mining District Act, 1863,** but no documentation relating to it has been found.

Governor Douglas remained in office long enough to meet the first Legislative Council of British Columbia on January 21, 1864 and he was then succeeded by Frederick Seymour. In his address to the new Council the old Governor restated his policy of encouraging settlement "of the waste lands of the Crown," and he said:

> "I have thought it incumbent on my Government to pursue, as a fixed policy, a course that would tend to the increase of population and encourage the settlement of the waste lands of the Crown, which are now unproductive alike to the Sovereign and to the people.
>
> The Native Indian Tribes are quiet and well disposed; **the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favourite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and for ever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the Natives.**
>
> The areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned, and are to be held as the joint and common property of the several tribes, being intended for their exclusive use and benefit, and especially as a provision for the aged, the helpless, and the infirm.
>
> The Indians themselves have no power to sell or alienate these lands, as the Title will continue in the Crown, and be hereafter conveyed to Trustees, and by that means secured to the several Tribes as a perpetual possession.

> That measure is not however intended to interfere with the private rights of individuals of the Native Tribes, or to incapacitate them, as such, from holding land; on the contrary, they have precisely the same rights of acquiring and possessing land in their individual capacity, either by purchase occupation under the pre-emption Law, as other classes of her Majesty's subjects; provided they in all respects comply with the legal conditions of tenure by which land is held in this Colony.
>
> I have been influenced in taking these steps by the desire of averting evils pregnant with danger to the peace and safety of the Colony, and of confirming by those acts of justice and humanity, the fidelity and attachment of the Native Tribes to Her Majesty's rule." (My emphasis). (Ex. 1184-27).

While I accept the foregoing as an accurate statement of colonial policy, approved in all respects by the Crown, I tend to doubt the correctness of the Governor's views about the satisfaction of the Indians, although he may be partly correct in the optimistic and almost romantic view he often expressed about the Indian attitude towards the arrangements being made for their accommodation. By this time the disease epidemics had occurred and were continuing, and alcohol had become a serious problem.

Douglas was succeeded as Governor of the Colony of Vancouver Island by Arthur Kennedy who served until the 2 colonies were united in 1866.

**Calder X,** (Ex. 1186-63), dated April 11, 1865, was, of course, enacted by the Governor, "by and with the advice and consent of the Legislative Council," and was entitled **An Ordinance for regulating the acquisition of land in British Columbia.** It re-enacted the principal provisions of previous land Ordinances but is a much more detailed code of pre-emption. It provides by s. 3:

> "All the lands in British Columbia, and all the mines and mineral therein, not otherwise lawfully appropriated belong to the Crown in fee."

S.12 provided that "all" unoccupied and unsurveyed and unreserved Crown lands, "not being the site of an existent or proposed town, or auriferous land available for gold or silver mining purposes, **or an Indian reserve or settlement . . . ,"** would be available for pre-emption. It was duly submitted to the Imperial Parliament and given Royal Assent. (my emphasis)

**Calder XI,** (Ex. 1186-68), dated March 31, 1866, was **An Ordinance further to define the law regulating the acquisition of land in British Columbia."** Prior to this enactment Indians, along with aliens who took an oath of allegiance, were qualified to preempt land. This Ordinance provided that such right would not extend to ". . . Companies . . . **or, without the permission aforesaid, to or on any of the Aborigines of the Colony . . . ,"** The historical explanation for this is that speculators were unfairly accumulating land pre-empted by Indians. Special permission was given for Indian pre-emptions in some, but not many cases, but it is not known how many applied.

This provision remained in the law until 1953. Indians continued to have the same access as anyone else to the unalienated lands of the Crown.

This, of course, marked an unfortunate departure from the policy established by Governor Douglas, which had contemplated Indians having the same rights and privileges, except for their protected reserves, as everyone else. This undoubtedly illustrates the difficulties then encountered, (and which continue), in accommodating the two cultures.

I interrupt this review of the **Calder XIII** (land Ordinances) to mention that on August 6, 1866 the Imperial Parliament enacted the **British Columbia Act, 1866,** providing for the Union of the colonies of Vancouver Island and British Columbia, under the name of the latter. This Act was proclaimed into law in the Colony on November 17, 1866.

**Calder XII,** (Ex. Ex. 1186-73), dated March 10, 1869, related only to the payment of the purchase price of pre-empted lands.

**Calder XIII,** (Ex. 1186-80), was passed by the Legislative Council April 22, 1870. It was a substantial re-enactment and consolidation of much of the above Ordinances. It repealed **Calders II to XII** inclusive, but provided that such repeal would not prejudice or affect any rights acquired under any of them. Clause III provided that any male British Subject of the age of 18 years could acquire the right to pre-empt "any" of the

> "... unoccupied, unsurveyed, and unreserved Crown lands **(not being an Indian Settlement)** not exceeding [320 acres east of the Cascades and 160 acres to the west] **... Provided that such right of pre-emption shall not extend to any of the Aborigines of this Continent, except as shall have obtained the governor's special permission in writing to that effect."** (My emphasis).

In his reports to Governor Musgrave on the passage of this new law, the Attorney-General Mr. Crease did not comment on this restriction. However, that may be culturally understandable because he also did not comment upon the restriction of pre-emption rights to male persons.

In addition to the **Calder XIII** instruments, the province relies upon further colonial proclamations or Ordinances which were referred to London for approval and which in most cases received Royal Assent. These include enactments having the force of law which dealt with subjects corollary to the land laws already detailed, and other matters such as the constitution of the courts of the province, a code for gold mining without limiting the right of the Crown to make reserves for Indian settlements, telegraph lines on lands "not reserved for Indians," the sale or barter of game, the protection of Indian graves, the settlement by magistrates of disputes about the boundaries of reserves or with whites, and land registration which provided for the granting of a certificate of title which was:

> "... conclusive evidence in all courts of justice that the person named therein is the absolute owner of an indefeasible fee simple in real estate therein mentioned against the whole world ..." (except the Crown)

The province also relies upon what it calls "Miscellaneous Statutory Instruments." These are very extensive, comprising Tabs 17 to 124 in Ex.'s 1200-1 and 1200-2. They are described by counsel for the province in his written outline of argument as consisting "... of a collection of Colonial regulations, proclamations, ordinances and enactments but without the underlying documents (which were furnished for the **Calder XIII** instruments indicating transmittal to London, consideration there and approval thereafter). They touch upon almost every part of life in the colony."

The province argues, as it did in **Calder,** that these 13 colonial Ordinances and, in this case, the other enactments or regulations which all became law prior to the transfer of jurisdiction respecting Indians and Indian lands to Canada in 1871, effectively extinguished any common law aboriginal interests which might have existed upon the establishment of the colony in 1858. I shall return to this question later.

## Summary

After confederation with Canada a dispute arose between Canada and the province about Indian matters and Mr. Walkem, the provincial Attorney-General wrote a report dated August 17, 1875 which was adopted by the Executive Council. In his report the Attorney-General described the policy of the Colony relating to Indians. He wrote:

> "The policy of the Dominion aims at a **concentration of the Indians upon Reserves,** while that of the Crown Colony, besides granting Reserves in cases where the Indians preferred them, courted rather an opposite result. The Colonial Policy was first inaugurated under the auspices of the Imperial Government in 1858, the date of the foundation of the Crown Colony. Under this policy the Natives were invited and encouraged to mingle with and live amongst the white population with a view of weaning them by degrees from savage life, and of gradually leading them by example and precept to adopt habits of peace, honesty and industry. It is true that this step was not unattended with some of the well known evils which are unfortunately inseparable from the attempted fusion of savage and civilized races, but these defects it was believed would in time have been largely removed by the application of proper remedies. (Walkem's emphasis, Ex. 1182, p. 21 [2nd pagination]).

By to-day's morality, the foregoing will be regarded by many as an attempt to destroy Indian culture and identity. By the standard of the day, compared with the rest of the world, it was probably enlightened. I need not pronounce on that question.

Although Governor Douglas intended the Indians would be treated equally with white settlers, it did not work out that way. Indian reserves were established in or near the settled areas (not including "the territory" where settlement and reserves came later), and the Indians had free access to all unoccupied Crown lands instead of being confined to reserves. Otherwise, the Indians were, as later stated by Trutch, more or less left alone. Being reticent people, and benefiting in some respects from the industry and trade goods of the settlers, they often did not object to the inroads made into the geography of the Colony. There seemed to be room enough for everyone.

In fact, white and immigrant populations in the province grew from the 5,000 mentioned by Governor Douglas in 1859 to perhaps 12,000 at the time of Confederation, while the Indian population probably remained more or less the same, estimated from 25,000 to 40,000 with the great majority of them on or near the coast living off the sea, rivers and land to which they had free access. They were often thought not to have any need for reserves much larger than their village sites.

For reasons which can only be answered by anthropology, if at all, the Indians of the colony, while accepting many of the advantages of European civilization, did not prosper proportionately with the white community as expected. Notwithstanding the policy enunciated by Governor Douglas, the anticipated equality of life and opportunity with the white community quickly turned (even before Confederation) into the same depressing, continuing and paternalistic inequality experienced in most areas of North America. The prohibition of Indian pre-emption of land is but one example, but possibly not a significant one because they probably would have sought only infrequently to obtain land in this way. Also, I doubt if they would have long retained any land they might have obtained by pre-emption because their culture had not prepared them for the disciplined life of a tax paying agriculturalist.

No one can speak with much certainty or confidence about what really went wrong in the relations between the Indians and the colonists. As will be shown in the next Part of this judgment, there was, and there is still continuing, much recrimination against the way the Indians were treated here and in the rest of the Dominion, yet the result seems to be more or less the same throughout North America. I suspect **Woodcock** is correct in his recent **History of British Columbia,** 1990, when he suggests Indian dependence upon the white society was one of their greatest problems. In my view the Indians' lack of cultural preparation for the new regime was indeed the probable cause of the debilitating dependence from which few Indians in North America have yet escaped.

It would be overly simplistic, and probably inaccurate, to say that the white settlers were either too kind or too cruel, and that the Indians should either have been given more support, and the dependence increased, or no support at all so that a dependence would not have arisen. So long as Indians had access to white communities there was bound to be a mixing of incompatible cultures.

Being of a culture where everyone looked after himself or perished, the Indians knew how to survive (in most years). But they were not as industrious in the new economic climate as was thought to be necessary by the newcomers in the Colony. In addition, the Indians were a greatly weakened people by reason of foreign diseases which took a fearful toll, and by the ravages of alcohol. They became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not compete.

Many have said with some truth, but not much understanding, that the Indians did not do as much for themselves as they might have done. For their part, the Indians probably did not understand what was happening to them. This mutual solitude of misunderstandings became, and remains, a dreadful problem for them and for everyone.

What seems clear, however, is that the source of Indian difficulty was not the loss of land for aboriginal purposes. So far as the evidence shows, they were largely left in their villages and an aboriginal life was available to them for a long time after the "Indian problem" was identified. The first settlers did not enter the territory until about 1900 by which time serious hardship had already been identified, and they were already starting to congregate in the Skeena and Bulkley River villages.

Preoccupied with the business of getting a new colony started, and of scratching out a hard life in a hard land, the new white settlers, and particularly their leaders, did not pay sufficient attention to the real and potential sociological, cultural and economic difficulties the Indians were experiencing. They became a problem seen through European eyes to be dealt with bureaucratically — an Ordinance here, a dollar there, and tragedy almost everywhere. I suspect the white community understood what was happening to the Indians but did not have the resources, or the knowledge, to respond appropriately.

Even to-day, it is difficult to say what should have been done short of abandoning the settlement of the colony. There is an obvious down-side to every possible alternative. Even a division of the colony between settlers and Indians was not possible for there was no part of the colony where Indians did not have a presence. Much larger reserves may have helped, but probably not without segregation which would have been severely criticized on other grounds. As in so many other parts of the world, the seeds of present difficulties were sown, not intentionally I am sure, but by mixing two cultures, and by indifference, during the colonial period.

## PART 12

# THE RELEVANT POLITICAL HISTORY OF THE PROVINCE FROM UNION WITH CANADA IN 1871 TO THE PRESENT

There were numerous communications from Governor Musgrave to the Colonial Office in the late 1860's about the troubled demographic state of the colony caused by the presence of so many migratory Americans and Indians, and the Governor warned of the need for a strong Executive and a settled policy in order to "govern and protect" the Indians. A reasonable place to start is a Memorandum written in 1870 by Joseph W. Trutch because he became such a prominent person before and after Confederation, and the plaintiffs' principal **bete noir** in this case.

This came about because of an 1869 letter written by a Mr. W. S. Seabright-Green to the secretary of the Aborigines Protection Society in London on "The miserable condition of the Indians in Vancouver Island," making many serious complaints against the local government. This found its way by way of the Colonial Office to Governor Musgrave who in turn referred it to Mr. Trutch, the Commissioner of Lands and Works and Surveyor-General of the Colony.

In his 1870 reply to Mr. Seabright-Green's letter, Trutch reviewed the Indian policy of the colony and unreservedly refuted many of the allegations made by Mr. Seabright-Green. Trutch said:

> "It is not true, as he avers, that in this Colony we have 'no Indian Policy whatever;' that 'there are no Indian Agents;' and that "the only friends the Indians have in the Colony are the Missionaries.' On the contrary, for the past ten years at least, during which I have resided in this Colony, the Government appears to me to have striven to the extent of its power to protect and befriend the Native race, and its declared policy has been that the Aborigines should, in all material respects, be on the same footing in the eye of the law as people of European descent, and that they should be encouraged to live amongst the white settlers in the country, and so, by their example, be induced to adopt habits of civilization. In the more settled districts the Indians now reside mostly in the settlements, working for the white settlers, eating similar food, and wearing similar clothing, and having, to a great extent, relinquished their former wild, primitive mode of life. In these respects the native race has undoubtedly derived very material benefit from their contact with white people, whilst it is undoubtedly equally certain that it has thence contracted a large share of the vices, and attendant disease which have ever been inevitably entailed by European races, on the Indians of this continent amongst whom they have settled.

> This policy towards the Indians has been consistently carried out, so far as I am aware, by successive Governors, and under it the Indians have assuredly, as Mr. Green states, 'been made amenable to English laws;'...
>
> The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has, in all cases where it has been desirable for the interests of the Indians, set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each tribe; and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.
>
> **But the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied.** In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes." (Ex. 1203-1; s. I, Tab 7, p. 2)

The foregoing views of Trutch are important because he was the colony's principal negotiator of the Terms of Union with Canada, and later the first Lieutenant-Governor of the province.

In their argument plaintiff's counsel make serious allegations against many Colonial officials including Trutch, Robson, Crease and Governor Musgrave. They allege Trutch "purposely lied" (in the discussions on Confederation) and that he participated in a scheme of misinformation which led to the "impoverishment of the people." Counsel allege a "perversion of history," and refer particularly to an incident in the Legislature on March 25, 1870 when discussion about a motion brought by Mr. Holbrook, "... to protect the Indians during the [proposed] change of government..." was suppressed and defeated by a vote of 20 to 1.

What is missing in the Trutch memorandum, of course, is specific mention of the early land treaties on Vancouver Island but there is no direct misstatement in what he says about "special arrangements". Historians have not generally treated Trutch as unkindly as plaintiff's counsel. Dr. Margaret Ormsby, in her **British Columbia: A History,** Evergreen Press, 1958, calls him the saviour of Confederation. Robert Cail in **Land, Man, and the Law; The Disposal of Crown Lands in British Columbia, 1871-1913,** University of British Columbia Press, 1974 says it is possible that neither Trutch nor the other Dominion and Colonial officials negotiating the terms of Union "... intended to be anything less than candid..." (p. 185) But Cail also says at p. 191:

> "The evidence does not prove that Trutch himself was not convinced that the Indian policy of the province was anything but in the best interests of both the Indians and the white settlers, but it does suggest that he was not anxious to have the details of that policy known to the dominion authorities."

Even though Trutch clearly set out his understanding of the Indian policy of the colony in his 1870 memorandum, the evidence about the character of Trutch is equivocal and, there being no need to do so, I think it best not to enter into that controversy. Such matters are better left to historians.

I suspect, however, that the views Trutch expressed in the foregoing passages may not be representative of what was happening to Indians throughout the province. Undoubtedly there was a measure not of assimilation, but rather of conformity on the part of many Indians with the growing white population. This was particularly evident in the larger centres such as Victoria and New Westminster and in the various mining camps throughout the limited areas affected by mining activity or settlement. Even in the territory the Indians were understandably taking whatever advantage they could of the white economy, particularly by utilizing its market for their furs and by working for wages. It is impossible to say if they were better or worse off as a result of these changes. I suspect they would hardly be aware of the policies described by Mr. Trutch.

Reserves were, however, being allocated, most probably on a unilateral basis in the sense that the Indians took little part in the process. They were free, as they had always been, to use unoccupied land as they chose, and as a result land use probably changed hardly at all in the territory, at least until the settlers started arriving in the early years of this century.

I digress for a moment to mention a few excerpts from history, not related to British Columbia, to illustrate that there was a variety of views about aboriginal interests in the common law world which were far from unanimous or consistent, and which provided the background for the controversies which arose between British Columbia and Canada after Union was achieved.

The first example I shall mention relates to the situation in New Zealand which resulted in the case of **R. v. Symons** [1847] N.Z.P.C.C. 387 (N.Z.S.C.). It is not necessary to detail all the circumstances which arose in that colony as a result of the **Treaty of Waitangi, 1840,** but there was a Report of a Select Committee of the Imperial House of Commons enquiring into the state of the Colony of New Zealand in 1841. This report seems never to have been formally accepted by Parliament. Some very strong statements were made in that Report of which I shall give just one example. I do this because it may have influenced many other colonial officials in the period that I am considering. The Committee quoted with approval the statement of Sir George Gipp, the Governor of New South Wales:

> "... the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to any individuals not of their own tribe any portion of it, for the simple reason, that they have not themselves any individual property in it ..." (Ex. 1184-3, p. iii)

For an interesting discussion of the situation in New Zealand, see a recent Article of Professor Hamar Foster published in **1988-89 U.B.C. Law Review,** p. 629.

What is missing in these discussions is the absence of a precise definition of terms. In New Zealand the Treaty guaranteed to the Maori "... full, exclusive, and undisturbed **possession** of their lands and ... fisheries ... so long as it is their wish and desire to retain the same in their **possession.**" This led to an understandable dispute about whether this meant all lands **claimed** by the Maori (which included 95% of the Colony), or lands actually occupied and cultivated by them. The Colonial Office, reluctantly, decided it had to support the view most favourable to the Maori although it thought the drafters of the Treaty had greatly exceeded their authority. This favourable view, for the Maori, was accepted by the Court in **R. v. Symons** upon its construction of the Treaty.

In giving his judgment in **Symons,** Chapman J. suggested that this view "did not assert either in doctrine or in practice anything new and unsettled." Chapman J. referred to "the Common Law of the British Colonies" but I am not satisfied his views ever were the law in colonial North America, particularly in the original colonies, prior to the **Royal Proclamation.**

There was, of course, no treaty similar to the **Treaty of Waitangi** in this province.

Secondly, before its division into Upper and Lower Canada, the Province of Canada in 1857 sent a representative to London as an observer at proceedings of a Select Committee of the House of Commons on the Hudson's Bay Company. There he spoke of earlier treaties and of the need to deal justly with the Indians by not depriving them of their property "... without a reasonable compensation." When asked about extinguishing Indian title to Lord Selkirk's land, Edward Ellice, M.P., a shareholder in the Company, said:

> "We are getting into a question about Indian title, which is very difficult altogether. The English Government never extinguished the Indian title in Canada when they took possession; the Americans, while they have been extending their possessions, have extinguished the Indian title, but in Canada there has never been any treaty with the Indians to extinguish the title; the Crown, retaining certain reserves for the Indians, has always insisted upon the right to occupy the lands, and to grant the lands." (Ex. 1183 p. 347)

In response to a letter from a clergyman from the Red River Settlement, who argued for land cession treaties with the Indians, Herman Merivale, the Permanent Under Secretary of State for the Colonies wrote in 1858:

> "This letter alludes to one matter which is new to me ... I mean the claims of Indian tribes over portions of Lord Selkirk's land & generally over the territories comprised in the [Hudson's Bay Company] Charter — The Americans have always taken care to extinguish such rights however vague — We have never adopted any very uniform system about them. I suppose the H.B.C. have never purchased from such claimants any of their land. And I fear (idle as such claims really are, when applied to vast regions of which only the smallest portion can ever be used for permanent settlement) that the pending discussions are not unlikely to raise up a crop of them." (Ex. 1056-25, Tab 1 p. 261)

In reply to another inquiry about the Red River Settlement, particularly "whether the Imperial government intended to recognize the proprietary rights of the Indians in the soil," Merivale said:

> "... In the old days no one ever thought of recognizing 'territorial rights' in Indians. Charles the Second simply made over to the Bay Company the freehold of the soil in their Charter territory. According therefore to English real property notions, the Indians had no 'territorial rights' within that territory at all ...
>
> I think it might be pretty safely assumed, that no right of property would be admitted by the Crown as existing in mere nomadic hunting tribes over the wild land adjacent to the Red River Settlement. But that agricultural Indian settlements (if any such exist) would be respected and that hunting ground actually so used by the Indians would either be

> reserved to them or else compensation made." (Ex. 1201-1, Tab 2, p. 201d)

There are, of course, many other comments to the opposite effect but it is impossible to know whether the authors were writing of village sites, or the whole country. Even in the quotation from Merivale, there is a lack of definition of "hunting grounds."

Upper Canada, being **Royal Proclamation** country, entered into the Robinson-Huron and Robinson-Superior treaties of 1850, and the Manitoulin Island Treaties of 1862 with Indians to which aboriginal interests were ceded in exchange largely for Reserves although some minor annuities were also paid.

After Confederation in 1867 Parliament by a Joint Address to the Imperial Parliament requested that steps be taken to unite Rupert's Land and the North West Territory with Canada. By this time the boundaries of British Columbia had been clearly settled, and what they were talking about was all of the Canadian west and north-west except Manitoba and British Columbia. Parliament represented that:

> ". . . upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines . . ." (Ex. 1203-1; s. I, Tab 1, Sched. A, p. 264)

In fact, however, the terms by which Rupert's Land was transferred to Canada imposed no obligation upon Canada, only that:

> "8. It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them." (Ex. 1203-1; s. I, Tab 1, Sched. B, p. 267)

But in accepting the terms agreed upon, Parliament only resolved in 1869:

> "That upon the transference of the territories in question to the Canadian government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose Interests and well-being are involved in the transfer."

At just this time there was considerable disquiet in a part of Rupert's Land called the Red River Colony which delayed the completion of these arrangements for nearly a year. Some residents of mixed blood were opposed to union with Canada, fearing they would lose existing independence. Canada sent a Commissioner, and later Lord Strathcona, both of whom gave many assurances.

It is apparent that a theory of history was operating at this time to create a mind-set in the Government of Canada which was, to say the least, different from what some colonial officials in British Columbia then believed about Indian interests. Neither was entirely consistent and neither was necessarily right or wrong. The existence of these different views became a source of considerable controversy shortly after British Columbia joined the Canadian Confederation. Some modern jurisprudence, (particularly cases such as **Guerin** and **Sparrow**) might not have completely surprised many of these early colonial officials because it was not really disputed that the Indians did indeed have aboriginal interests of some sort in the lands and waters which they actually used for subsistence. On the other hand, I believe the plaintiffs' claim for ownership, except as to village sites, etc., and their claim for jurisdiction would have shocked them greatly.

Discussions about a possible union with Canada began in earnest with a communication dated August 14, 1869 from the Colonial Secretary, Lord Granville, advising that, as arrangements with the Hudson's Bay Company seemed to be nearing completion, the union of British Columbia with Canada should be considered. He mentioned, however, that it would be necessary for the Governor "... to enter personally upon many questions, [such] as the condition of Indian tribes ..."

The foregoing, and many other dispatches back and forth between officials of the colony, Canada, and the Colonial Office, make it abundantly clear that the attitude of the provincial officials was clearly understood in Ottawa and London. For example, on February 20, 1870 Governor Seymour sent a copy of his opening statement to the Legislature to the Governor-General of Canada in which he stated:

> "In Lord Granville's Despatch No. 84 of 14th August which was communicated to Your Excellency he mentioned the condition of the Indian Tribes as among some questions upon which the constitution of British Columbia will oblige the Governor to enter personally. I have purposely omitted any reference to this subject in the terms proposed to the Legislative Council. Any arrangements which may be regarded as proper by Her Majesty's Government can I think best be settled by the Secretary of State, or by me under his direction, with the Government of Canada. But "Indians' and 'Lands reserved for Indians' form the twenty fourth of the classes of subjects named in the 71st Section of the Union which are expressly reserved to the Legislative authority of the Parliament of the Dominion." (Ex. 1201-1 Tab 13)

I do not find it necessary to detail the negotiations for the Union of British Columbia with Canada which became effective on July 20, 1871, for there is a singular lack of a written record of these discussions which were conducted in Ottawa except for Dr. Helmcken's brief diary entries, one of which states:

> "The clause about Indians was very fully discussed. The Ministers thought our system better than theirs in some respects, but what system would be adopted remained for the future to determine. I asked about Indian Wars and Sir G. Cartier said that it depended upon the severity, as a rule the expense would have to be borne by the Dominion Govt." (Ex. 1201-1, Tab 19, p. 357)

I have no reason to doubt that the policy mentioned by Dr. Helmcken was the policy established by Governor Douglas as already described.

It may be significant to note that, at the same time, Canada was negotiating for union with the "province" of Assiniboia, later a much enlarged Manitoba, and there was much discussion about buying up the "Indian title," although that term seems not to have been specifically defined. Canada also commenced the negotiation of the Numbered Treaties, the first two of which were completed in 1871. In the House of Commons debates on the Manitoba Bill, Sir John A. Macdonald said in connection with "Metis":

> "... With respect to the lands that are included in the Province, the next clause provides that such of them as do not now belong to individuals, shall belong to the Dominion of Canada ...There shall, however, out of the lands there, be a reservation for the purpose of extinguishing the Indian title, of 1,200,000 [later amended to

> 1,400,000] acres . . . This reservation, as I have said, is for the purpose of extinguishing the Indian title and all claims upon the lands within the limits of the Province . . . It is, perhaps, not known to a majority of this House that the old Indian titles are not extinguished over any portion of this country, except for two miles on each side of the Red River and the Assiniboine [this exception is a reference is to the Selkirk Treaty of 1817]." (Ex. 1203-1; s. I, Tab 10, col. 1292-93)

There was, of course, no similar provision in the Act of Union with British Columbia. In the House of Commons debate on union with British Columbia, Cartier stated that while certain lands had been reserved for Indians in the province, ". . . the only guarantee that was necessary for the future good treatment of the Aborigines was the manner in which they had been treated in the past."

The plaintiffs argue that the Dominion's officials were misled by the province but it is impossible to reach any conclusion on that question. Later views expressed by Dominion officials indicate that there may have been a misunderstanding but even that is difficult to describe accurately. The disagreement which later arose centred largely around the size of reserves and the question of extinguishing "Indian title," not about the actual conditions of the Indians. I doubt if there could have been what Dr. Helmcken described as a "very full" discussion, without the Dominion officials learning that the colony did not admit the existence of any "Indian title."

The Terms of Union with Canada, of course, included, (a) Term 13, and (b) the adoption of ss. 91 and 92 of the then **British North America Act, 1867,** and (c) s. 109 of that **Act** which placed all the public lands of the [province] under the control of the Local Government subject to existing "Interests".

Term 13, which is a part of the Constitutions of Canada and British Columbia provides:

> "13. The charge of the Indians, and the trusteeship & management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government, shall be continued by the Dominion Government after the Union. To carry out such policy tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of Land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies."

Sec 91 (24) provided, and still provides:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all

> Matters coming within the Classes of Subjects next herein-after enumerated: that is to say: . . .
>
> 24. Indians, and Lands reserved for the Indians . . .

In view of what later occurred, it is my view that there was at most a misunderstanding between Dominion and British Columbia officials about the Indian problem in the province. Dr. Helmcken's diary, which is the only real evidence on this question, supports the province but there are always opportunities for misunderstanding when strong-willed men sit down to discuss a great number of vast, multi-dimensional problems. In such a milieu one's understanding is often conditioned by what he thinks others mean rather than by what the speaker actually says or means. There is no profit in attributing blame or bad intentions on anyone from this great distance.

In any event, Canada soon became aware of the situation because of the visit of Canada's Minister of Public Works, Hector Langevin, who came to British Columbia in 1871. His report includes a section on Indians, including a report from Chief Justice Begbie. After mentioning the great number of tribes which would make a general treaty impossible, Chief Justice Begbie said:

> "They are in that state of powerlessness and respect for the superior power, numbers, and arrangements which that race would, consistently with self-respect and humanity, think proper, would readily be adopted by the natives.
>
> "Their chief anxiety always is about their reserves of land which, perhaps necessarily, have not always been made in accordance with their wishes. The manner in which they hold and occupy land (village communities frequently occupying and cultivating irregularly detached plots) is a tenure scarcely intelligible to English notions of property in land at all; and they have an affection for particular little bits of land (which seems a feeling common to humanity, savage or civilized), which, probably is exceedingly inconvenient to a surveyor, and is not always, in our view, very reasonable." (Ex. 1203-1: s. II, Tab 1, p. 26-27)

Langevin declined to make any recommendations regarding the future treatment of Indians, but he attached to his report both the 1870 memorandum prepared by Trutch which denied any Indian title, and a second critical memo prepared by the Anglican Bishop of British Columbia which recommended treaties to extinguish Indian title. Langevin further advised strongly against adoption of the American system of confining Indians to reserves.

By this time Trutch had been appointed Lieutenant-Governor. On September 26, 1871 he wrote to the Secretary of State for the Provinces in Ottawa in response to an enquiry about a grant of funds to the Anglican Church for Indian purposes. After expressing the view that the charge of the Indians was ". . . amongst the most critical and direct responsibilities" of the Dominion, and after advising against grants to third parties for Indian purposes, he said:

> "As to the Indian policy hitherto of the Government of British Columbia, for, although not a written code based on legislation, the policy of the Government in Indian affairs has been 'definite and tangible' — a well considered system, ably devised by experienced men specially interested in favour of the Indians, to suit the circumstances of this Country, and consistently carried out so far as the pecuniary means at

> command would admit of (as proof of which I need only point to the remarkable freedom from Indian disturbances, few in number as we have seen, scattered through this immense territory among some fifty thousand Indians.) I would observe, that in direct contrast with the Indian system of the United States, [which proposed that all Indians would live on reserves] ....the one adopted in this Province does not appear to me to require reform, but greater development..." (Ex. 1182, p. 99-100)

The Bishop's report, however, included some specific charges of neglect. In partial answer, Trutch sent to the Secretary of State for the Provinces a copy of his January 1870 Memorandum mentioned above, and then concluded:

> "But I contend that the policy which has prevailed in British Columbia since its settlement by Europeans, has been essentially benevolent towards the Indians; that the degree of civilization which we have introduced into their country has in fact conferred infinite benefits upon them, although bringing with it all the evils incidental to its vices; and that this system needs not change or reform, but only increased means to bring out its real merits and capabilities. And chiefly I urge that the grave responsibility which the Government of the Dominion has undertaken towards these Indians and to the people of the Province in general respecting them, should not be devolved on others from any consideration whatever." (Ex. 1201-1, Tab 33, p. 101)

This typical Canadian dichotomy became manifest in the **Dominion Lands Act, 1872,** which by s. 42 made the **Act** inapplicable with respect to the settlement of agricultural land or the granting of mineral or timber leases in any territory "... the Indian title to which shall not at the time have been extinguished." This provision remained in the **Act** until 1908 by which time all or nearly all of the Canadian west, except for British Columbia west of the Rockies, had been ceded by the various prairie and northern tribes to Canada by numbered treaties. I do not find it necessary to determine if this was done in discharge of an obligation assumed under the agreement with the Hudson's Bay Company, or whether those responsible for Canada's policy at that time actually believed the prairie Indians did indeed have some kind of aboriginal interests both.

This difference of opinion between the Dominion and British Columbia is illustrated by the treatment of the British Columbia "Railway Lands." One of the costs of Confederation to the province was the huge block of land ceded to Canada for railway purposes. Much of this land was transferred to the Canadian Pacific Company and the balance returned to British Columbia without any recognition that it was burdened in any way by aboriginal rights. This is perfectly consistent with the view of the province that there were no aboriginal rights, or that they had been extinguished by colonial enactments. This was later mentioned by Judson J. in **Calder** as an argument in favour of extinguishment.

This transaction was inconsistent with the view generally expressed by the Dominion because it transferred most of these lands to the railway company as if they were free of Indian claims.

In 1872 there was an incident at Kitseguecla, one of the Skeena villages in the territory, where the village was burned by an accidental fire, causing much apprehension and hostility. On July 16 of that year Trutch wrote to Sir John A. Macdonald mentioning the "troubles at Skeena" and urging the early appointment of a Special Agent to take charge of Indian affairs in the province. He said that the Indians, having learned that a new system was to be adopted, were becoming restless and dissatisfied "... at having to wait so long for the good things which they are told are in store for them," and that they "appear to have of late become possessed with a spirit of agitation which was not exhibited under our old Colonial form of Government."

In October, 1872, after Canada appointed I.W. Powell to the post of Indian Superintendent for British Columbia, Trutch again wrote to the Prime Minister offering advice:

> "... as to Indian policy I am fully satisfied that for the present the wisest course would be to continue the system which has prevailed hitherto only providing increased means for educating the Indians — and generally improving their condition moral and physical. The Canadian system as I understand it will hardly work here — We have never bought out any Indian claims to lands nor do they expect we should — but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfil all their reasonable requirements for cultivation or grazing. If you now commence to buy out Indian title to the lands of B.C. you would go back of all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the districts now settled and farmed by white people equally with those in the more remote and uncultivated portions. Our Indians are sufficiently satisfied and had better be left alone as far as a new system towards them is concerned — only give us the means of educating them by teachers employed directly by government as well as by aiding the efforts of the missionaries now working among them." (Ex. 1203-1; s. II, Tab 6)

The Prime Minister replied:

> "... I quite agree with you in your view as expressed in your letter [of 14th] Oct last respecting Indian matters generally, and I hope to inaugurate a system for the management of the Indians both in British Columbia & the North West which will be satisfactory ..." (Ex. 1203-1; s. II, Tab 7)

The Prime Minister also proposed establishing three-member Indian Boards of Indian Commissioners to establish and direct policy in the provinces and territories.

Canada's ambivalence continued when it printed a Bill "respecting Indians and Indian Affairs" to be applicable in British Columbia, Manitoba and the North West Territories, the preamble of which recited the desirability of a uniform system and practice. This Bill impliedly recognized a form of aboriginal right because it provided that all lands unsurrendered and unconveyed to the Crown and claimed by any Indians would be placed in the care of the Superintendent. It also invalidated any deed, lease or instrument purporting to affect such lands. Other sections contemplated the negotiation of treaties of cession and the payment of annuities.

This Bill was not enacted in 1872, or in 1874 when it was reconsidered, probably because it was obviously beyond the power of Canada to deal in this way with provincial Crown lands. In fact, on January 4, 1873 Mr. Powell was instructed that pending the enactment of Dominion legislation his powers were limited by the laws of the province. This marked the end of the search for a uniform policy.

In June of 1873 Canada proposed to deal with the question of aboriginal rights by the establishment of a Board of Commissioners in the new Province of British Columbia.

Order-in-Council 860A, approved by Lord Dufferin (Governor-General of Canada) and dated June 16, 1873, provided:

> "On a memorandum dated 6 January 1873 from the Secretary of State of the Provinces calling the attention of your Excellency to the expediency of some more efficient organization of the management of Indian Affairs in the Province of British Columbia . . .
>
> That this Board under the direction of the Superintendent General of Indian Affairs at Ottawa would suggest that general principles under which the Indians are to be dealt with, arrange under the directions of the Superintendent General all negotiations and treaties with the Indian tribes and report from time to time the basis upon which all questions of general policy re Indian Affairs should be settled.
>
> The Secretary of State recommends that a Board of similar powers should be constituted in British Columbia consisting of the Lt. Governor and two subordinate Commissioners — one of those to be a Protestant the other a Roman Catholic — that they should be jointly the executive officers, and should so alternate their duties that one would always be at the head office of Victoria . . ." (Ex. 1203-2; s. III, Tab 26)

These Boards were constituted for the western provinces and territories but each with different instructions and composition. In British Columbia the Board consisted of the Lieutenant-Governor plus one Protestant and one Roman Catholic, and there were no instructions given to them to negotiate treaties as in the other regions. The British Columbia Board never functioned and it was cancelled in 1875.

In a letter to Trutch dated April 9, 1874, the Prime Minister expressed the view that the Lieutenant-Governor should be involved if ". . . treaties or important negotiations were made or entered upon . . ."

In 1874, however, while the Boards were still in place, Canada passed an Order-in-Council dated May 19, 1874 purporting to instruct the Commissioners for British Columbia, in which it was:

> ". . . assumed that the Government does not contemplate giving the Indians of British Columbia any compensation for their lands, as has been done with the Indians of the North West, and he the Minister submits that in view of the general discontent now prevailing amongst the former, it would be advisable to spend a small sum annually in the distribution amongst them of useful presents . . ." (Ex. 1203-1; s. III, Tab 7, p. 1)

The Governor-General, Lord Dufferin, while approving this Order-in-Council, appended a note: "Why is a different system pursued in B.C. with regard to Compensation to Indians from that in the N.W. Territories?" There were, of course, many reasons why there could be a different policy on the prairies as compared with British Columbia. The prairie Indians were nomadic hunters; the British Columbia Indians lived in villages near great rivers and subsisted mainly on the steady supply of salmon which they harvested each year. There is no evidence the Indians of the territory were nomadic, indeed there is much evidence they were not. In addition, there were vast unused regions of the prairies, while usable land in British Columbia has always been extremely scarce. It was possible for Canada to make payments had it chosen so to do, and this illustrates, again, the difficulties of a divided responsibility.

Just one week later Royal Assent was given to a Dominion **Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the provinces of Manitoba and British Columbia** (1874) 37 Vict. C. 21 which precluded furnishing liquor to Indians. However, most of the Act could not be applied to this province because it tied the definition of an Indian to a person who was receiving annuities, none of which were payable here. As a consequence, there was an amendment in August, 1874 making the Act inapplicable to British Columbia. This was another difficulty caused by divided jurisdictions.

In correspondence regarding the functions of the Indian commissioners in June 1874, the Dominion Minister of the Interior advised by telegram "... no treaties or special negotiations now necessary."

It was at this point that a serious dispute arose between British Columbia and Canada on several questions including the size of Indian Reserves. These matters are largely covered in Exhibit 1138, entitled "Indian Land Question, 1850-1875, 1877" printed in 1875 by British Columbia.

On October 12, 1874, in response to a letter from Mr. Lenihan, one of the Commissioners, the Provincial Secretary wrote that:

> "... all that is 'reasonable and just' to demand of the Provincial government is that the 13th section of the Terms of Union should be faithfully observed. Should the dominion Government be of opinion that concessions beyond those provided for in the said Section are necessary, it becomes the duty of that Government to make provisions accordingly." (Ex. 1182, p. 184)

Also that month James Douglas, the former governor, wrote in reply to an enquiry from the Commissioners:

> "... in laying out Indian Reserves, no specific number of acres was insisted on. The principle followed in all cases was to leave the extent and selection of the land entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular, and to include in each Reserve the permanent village sites, the fishing stations and burial-grounds, cultivated land, and all the favourite resorts of the tribes, and, in short, to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide as far as possible against the occurrence of agrarian disputes with the white settlers." (Ex. 1203-2; s. III, Tab 16, p. 36)

Some writers have suggested Douglas was incorrect in this statement for in his last address to the Legislature he stated that reserves did "... in no case exceed the proportion of ten acres for each family." Some writers suggest that Douglas was generous about reserves while others disagree. Again, I do not find it necessary to pass on this question except to say that I find no necessary inconsistency in the two statements attributed to him.

As a consequence of this and other information the Minister of the Interior, David Laird, prepared an extensive memorandum dated November 2, 1874 which was printed in two different versions. One copy was sent to the province on November 14, 1874, and is found in the British Columbia Papers just mentioned. The other version, with alterations made by Lord Dufferin, was sent to the Colonial Office in London.

The most important differences between the two versions are in the paragraph which purports to describe the understanding between the two governments with respect to Term 13 of the Terms of Union. This is what was sent to the Lieutenant Governor of British Columbia:

> "When the framers of the Terms of admission of British Columbia into the Union inserted this provision [Term 13], requiring the Dominion Government to pursue a policy as liberal towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast between the Indian policies which had, **up to that time,** prevailed in Canada and British Columbia respectively." (Ex. 1182, p. 152)

As altered and sent to the Secretary of State for the Colonies, the paragraph reads:

> "When the framers of the terms of admission of British Columbia into the Union inserted this provision requiring the Dominion Government to pursue a policy as liberal towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast between the Indian policy which has **always been pursued in Canada and the policy which is sought to be enforced in British Columbia."** (Ex. 1203-2; s. III Tab 16, p. 7)

Mr. Laird was not a member of the Government which negotiated the Terms of Union, and he was probably not aware of Dr. Helmcken's assertion that the clauses relating to Indians were fully discussed. It is not known if Mr. Laird was aware of Trutch's January 1870 report which described the position of the province and which was sent to the Colonial Office and would probably have been distributed to the appropriate officials in Ottawa.

The first version of Mr. Laird's memorandum recognized that the Indian policy in the Colony of British Columbia was different from Canada's at the time of Union. The altered version suggests otherwise.

There was another alteration — also unfavourable to the Province, and also suggesting that it sought to adhere to a policy different from that pursued by the Colony. It occurs in the paragraph following the one discussed above. The version sent to the Lieutenant Governor of British Columbia was:

> "Whereas in British Columbia, ten acres of land was the maximum allowance for a family of five persons, in old Canada the minimum allowance for such a family was eighty acres: and a similar contrast obtained in regard to grants for education and all other matters connected with Indians under the respective Governments. Read by this light, the insertion of a clause guaranteeing the aborigines of British Columbia the continuance by the Dominion Government of **the liberal policy heretofore pursued** by the Local Government, seems little short of a mockery of their claims." (Ex. 1162, p. 152)

The version sent to the Secretary of State for the Colonies says:

> "... Read by this light, the insertion of a clause guaranteeing the aborigines of British Columbia the continuance by the Dominion Government of a policy **as liberal as now pursued** by the Local

> Government, seems little short of a mockery of their claims." [Altered passages emphasized]. (Ex. 1203-2; s. III, Tab 16, p. 7)

The documents disclose: "These changes in the original draft were made on the copy sent by H. E. [His Excellency] the GG [Governor General] to the Colonial Secy — at His Excy's request."

The changes in the Privy Council document made at the instance of Lord Dufferin would seem to suggest that a change of policy occurred when British Columbia became a province — that is, after the Colonial Office ceased to have direct responsibility for the supervision of the Colony's handling of Indian Affairs. I mention these matters only because they may be useful in considering the weight to be attached to some later remarks of the Governor-General which will be mentioned in due course.

As already mentioned, comparisons with grants of acreage for reserves must reasonably be expected to vary between provinces. In mountainous areas of British Columbia where usable land is scarce, and in areas where the Indian diet consisted almost exclusively of salmon taken from the sea or the great rivers, there was less need for large reserves. As a result, numerous small reserves were allocated. On the prairies, on the other hand, where the Indians were more nomadic and lived off the hunt, much larger reserves were required and allocated. Presumably Mr. Laird understood this reality, but his memo gives no such indication. It should be noted further that no quota had been established by Canada at the time of the Terms of Union, and that none of the preConfederation land cession treaties were based upon such a quota. Acres per family were first used in a treaty on the prairies after British Columbia united with Canada.

Mr. Laird's comparison for the purposes of grants for education, however, may be more appropriate. Such grants were then a matter for Canada which had jurisdiction to enrich the former policy of the province.

Mr. Laird recited the attempt, by an Order-in-Council dated March 21, 1873, to impose a policy of 80 acres for every head of a family of 5. This was rejected by the province which countered with an allowance of 20 acres. This was confirmed by a provincial Order-in-Council. Mr. Laird complained that the province then attempted to limit such largesse to new reserves only, and not to use it as a policy for enlarging reserves already established at the time of confederation.

Mr. Laird went on to explain that the Commissioners, not being satisfied with 20 acres, suspended surveys which he described as a

> "... step calculated to aggravate the discontent and alarm of the Indians ... and will in a great measure, help to keep open the long pending dispute between the white settlers and the Indians ... which, in the summer of 1873, nearly led to an outbreak of the Indian population of the province ..."

I assume Mr. Laird was referring to the incidents at Kitseguecla and in the Chilcotin. Mr. Laird quoted Commissioner Powell as saying, "If there has not been an Indian War, it is not because there has been no injustice to the Indians, but because the Indians have not been sufficiently united."

He also said that, "To the Indian, the Land Question far transcends in importance all others, and its satisfactory adjustment in British Columbia will be the first step towards allaying the widespread and growing discontent now existing among the native tribes of that Province."

Mr. Laird also alluded to complaints by Indians that lands used by them had been pre-empted, and that grazing lands had been leased to settlers. Then, after complimenting the Dominion Government for the liberality of its treatment of the Indians, (including the allocation of $54,000 expected to be spent that year), and urging the Government to "... look beyond the terms [of Union], and be governed in their conduct towards the aborigines by the justice of their claims, and by the necessities of the case," Mr. Laird recommended:

> "The undersigned would therefore respectfully recommend that the Government of the Dominion should make an earnest appeal to the Government of British Columbia — if they value the peace and prosperity of their Province, if they desire that Canada, as a whole, should retain the high character she has earned for herself by her just and honourable treatment of the red men of the forest — to reconsider, in a spirit of wisdom and patriotism, the Land grievances of which the Indians of that Province complain, apparently with good reason; and take such measures as may be necessary, promptly and effectually, to redress them." (Ex. 1203-1; s. III, Tab 14)

This memorandum and the above recommendation were approved by Order-in-Council passed 2 days later. It recommended that a copy of Mr. Laird's Report be sent to Lord Carnarvon, the colonial Secretary, so that he might understand, "... in all its bearings, the great national question now seeking solution at the hands of the Dominion and British Columbia Governments."

I have already mentioned the different texts of Mr. Laird's Report. Lord Dufferin immediately sent the version most unfavourable to British Columbia to Lord Carnarvon with a covering memorandum "invoking your Lordship's interference."

His Excellency, in language undoubtedly drafted for him by his advisors, described the two policies:

> "In Canada the accepted theory has been, that while the sovereignty and jurisdiction, over any unsettled territory is vested in the Crown, certain territorial rights, or at all events rights of occupation, hunting and pasture, are inherent in the aboriginal inhabitants.
>
> As a consequence, the Government of Canada has never permitted any lands to be occupied or appropriated, whether by corporate bodies, or by individuals, until after the Indian title has been extinguished, and the districts formally surrendered by the tribes or bands which claimed them, for a corresponding equitable consideration.
>
> In British Columbia this principle seems never to have been acknowledged. No territorial rights are recognised as preexisting in any of the Queen's Indian subjects in that locality. Except in a few special cases dealt with by the Hudson Bay Company before the foundation of the Colony, the Indian title has never been extinguished over any of the territories now claimed as Crown property by the Local Government, and lands have been pre-empted and appropriated without any reference to the consent or wishes of their original occupants." (Ex. 1203-2; s. III, Tab 16, p. 1-5)

He went on to refer to the letter from Sir James Douglas just mentioned and concluded that it would be manifestly unfair to treat the Indians of British Columbia differently from those of the rest of Canada. There can be no doubt that the Governor-General was motivated by the highest morality but he seems to have confused the question of extinguishing aboriginal interests with the size of reserves.

Lord Dufferin also sent two private letters to the colonial Secretary dated November 26 and December 21, 1874 in which he expressed some very strong opinions on the conduct of the province. In the first one he said he would be sending:

> ". . . a very important Despatch covering an Order in Council relative to the unsatisfactory position of the Indian question in British Columbia. That Province appears to be treating its Indian subjects with great harshness. It does not recognize any obligation to extinguish the Indian title, before dealing with the Crown Lands." (Ex. 1040-86)

In the second letter to Carnarvon, Dufferin wrote:

> "I don't think I have written to you privately on the subject of the long 'British Columbia Indian' Despatch I had to send you. I don't think that there is anything to add to the case set forth in the official papers. The B.C.'s have evidently been behaving very badly, and they certainly should be required to extinguish the Indian title before assuming possession of the lands, which is the universal principle observed in every province of the Dominion, but the truth is British Columbia is hardly a large enough Community to have as yet developed a conscience." Ex. 1203-2; a. III, Tab 17, p. 125)

Lord Carnarvon, however, declined to interfere or even comment on His Excellency's suggestions, preferring to await a response from the province which did not arrive until August 18, 1875 when the Attorney-General Mr. Crease made a long report which I shall mention in a moment. In the meantime, however, other events were occurring.

The province passed a new "Land Act" in March 1874 which repealed the **Land Ordinance, 1870.** This new **Act** was the subject of a Report dated January 19, 1875, prepared by Mr. Hewitt Bernard, the Deputy Minister of Justice. He observed that there was not in the **Act** ". . . any reservation of lands in favour of the Indians or Indian tribes . . . nor are the latter thereby accorded any rights or privileges in respect to lands or reserves or settlements."

He also mentioned the November 4, 1874 Order-in-Council and then said:

> "But, having regard to the known existing and increasing dissatisfaction of the Indian tribes of British Columbia at the absence of adequate reservations of lands for their use, and at the liberal appropriation for those in other parts of Canada upon surrender by treaty of their territorial rights, and the difficulties which may arise from the not improbable assertion of that dissatisfaction by hostilities on their part, the undersigned deems it right to call attention to the legal position of the public lands of the Province.
>
> The undersigned believes that he is correct in stating that, with one slight exception as to the land in Vancouver's Island surrendered to the Hudson's Bay Company (which makes the absence of others the more remarkable), no surrenders of lands in that Province have ever been obtained from the Indian tribes inhabiting it, and that any reservations which have been made have been arbitrary on the part of the Government, and without the assent of the Indians themselves; and though the policy of obtaining surrenders at this elapse of time and under the

> altered circumstances of the Province may be questionable, yet the undersigned feels it his duty to assert such legal or equitable claim as may be found to exist on the part of the Indians.
>
> There is not a shadow of doubt that from the earliest times England has always felt it imperative to meet the Indians in Council, and to obtain surrenders of tracts of Canada as from time to time such were required for the purposes of settlement. (Ex. 1203-2; s. III, Tab 16, p. 46-50)

Mr. Bernard then referred to the Treaty of Capitulation of Montreal in 1760 and the **Royal Proclamation, 1763,** but concluded that it was not necessary to determine if the latter applied to British Columbia as "... it was sufficient ... to ascertain the policy of England in respect to the acquisition of the Indian territorial rights, and how entirely that policy has been followed ... except in the instance of British Columbia."

Although there had not been any land cession agreements between Indians and the Crown either in right of Great Britain or Canada in Labrador, the Maritime provinces or in Quebec at that time, the Minister of Justice joined in the recommendation that the British Columbia **Act** be disallowed by Canada on the grounds, as stated on p. 51 of the Report, that the title of the province to its public lands was subject to s. 109, and:

> "That which has been ordinarily spoken of as the 'Indian Title' must of necessity consist of some species of interest in the lands of British Columbia. If it is conceded that they have not a freehold in the soil, but that they have an usufruct, a right of occupation or possession of the same for their own use, then it would seem that these lands of British Columbia are subject, if not to a 'trust existing in respect thereof,' at least 'to an interest other than that of the Province alone.'" (Ex. 1203-2; s. III, Tab 20, p. 51)

Notwithstanding these reasons, the Report went on to suggest that such disallowance would not cause any great inconvenience in the disposal of public lands as the former **Act** could be used for that purpose. This seems quixotic. The British Columbia **Act** was accordingly disallowed by Order in Council dated January 23, 1875. As counsel pointed out in argument, the two main issues between the governments relating to Indians, that is title and acreage, were truly engaged.

But there was more, for on April 8, 1875 Canada extended its **Dominion Land Acts, 1872 and 1874** to all lands to which Canada was, or might become, entitled to in British Columbia which referred to the 40-mile wide "Railway Belt" the province was required to transfer to Canada for railway purposes, plus the 3½ million acres (the Peace River Block) which was compensation for lands within the belt which had been alienated while the decision was being made on the route of the railway. The significance of this, of course, was s. 42 of the 1872 **Act,** which provided:

> "None of the provisions of this Act respecting the settlement of Agricultural lands, the lease of Timber Lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian Title to which shall not at the time have been extinguished."

The application of this section to British Columbia had a short shelf-life for it was repealed in 1780. Moreover Canada had disposed of large portions of these lands without regard to the existence of any aboriginal interest in them, and reconveyed the residue to the province in 1930, again without any provision for Indians.

In order to respond to the Dominion, the Attorney-General, Mr. Walkem prepared a report dated August 17, 1875, which I have already mentioned. To this report were attached the 1870 Report of Mr. Trutch and two letters from William Duncan, a missionary, who will be mentioned later.

After defining the question as, "What assistance in land shall British Columbia now give to enable the Dominion to carry out her Indian policy?" the Attorney thought it necessary to give a brief sketch of the Indian policy of the Crown Colony "with a view of removing the very unjust impressions respecting it which have been created in the public mind by the publication of the Report of the Minister of the Interior."

He then stated, perhaps incorrectly, that "... the policy of the Dominion aims at a concentration of the Indians upon Reserves, while that of the Crown Colony, besides granting Reserves in cases where the Indians preferred them, courted rather an opposite result."

He continued:

> "... Under this policy the Natives were invited and encouraged to mingle with and live amongst the white population with a view of weaning them by degrees from savage life, and of gradually leading them by example and precept to adopt habits of peace, honesty, and industry. It is true that this step was not unattended with some of the well-known evils which are unfortunately inseparable from the attempted fusion of savage and civilized races, but these defects it was believed would in time have been largely removed by the application of proper remedies ...
>
> Such is but an imperfect sketch of the Colonial Indian Policy which was founded in 1858 and determined in 1871. It was based on the broad and experimental principle of treating the Indian as a fellow subject. The principle was, at least, a lofty one, and worthy of an enlightened humanity. Like others of its kind, it had its trials; but it also had its rewards, for, through its influence, the Colony was enabled on the day of Confederation to hand over to the trusteeship of the Dominion, a community of 40,000 Indians — loyal, peaceable, contented, and in many cases honest and industrious. This fact is in itself the best commentary that can be offered upon the policy pursued towards the Indians during the 13 years preceding Confederation." (Ex. 1182, p. 2)

In his report the Attorney-General referred to the disagreement with Canada on the size of reserves, mentioning that 10 acres for a family of five, which was not uncommon in the Colony at the time of Confederation would require about 80,000 acres for an assumed Indian population of 40,000, whereas the Dominion was requesting 80 acres per family or 640,000 acres. The compromise then offered by the Dominion was 20 acres per family or a total of 160,000 acres.

Urging that the province not be expected to agree to a formula which did not take into account "the habits and pursuits" of the Indians, and the physical characteristics of the province, the Attorney offered a solution which was suggested by the missionary Duncan.

Mr. Duncan later became a controversial figure in the history of the Indian question of the province, and he is sometimes alleged to be the "inventor" of aboriginal ownership of the province. He showed considerable foresight when he said, on May 15, 1875:

> "Let me then first assure the Government that I believe the present organization of the Indian Department in British Columbia can never work successfully, and that however sincerely desirous those who now exercise the management of Indian affairs may be to do their duty, to my mind so palpably defective and misdirected are their labours, that I fear when the Government and the public come to look for results, they will be sorely disappointed." (Ex. 1182, p. 18)

One hundred and fifteen years later, some believe the same may still be stated with considerable confidence.

Mr. Duncan called for decentralization of authority; resident superintendents with each of the main tribes; native constables; native councils; one large reserve for each language group plus traditional fishing stations, all as far removed from white settlements as possible; the abolition of money gifts to Indians as money spent on them tends to alienate them, although small sums wisely spent will yield much good. In this regard he said:

> "To treat Indians as paupers is to perpetuate their baby-hood and burdensomeness. To treat them as savages whom we fear and who must be tamed and kept in good temper by presents, will perpetuate their barbarism and increase their insolence" and that gifts should be given "only to assist those who are endeavouring to rise higher in social life and are law-abiding subjects of her Majesty." (Ex. 1182, p. 15)

Nowhere in either of the two letters of Mr. Duncan was there any mention of Indian title, although he later became a strong advocate of enhanced Indian legal rights.

The Attorney accordingly recommended that there be no fixed acreage formula for reserves; that the Dominion appoint an agent for the "proper adjustment of Indian claims"; that reserves, including agricultural, wild, and forest land be set aside for each "Nationality of Indians"; that the reserves be adjusted from time to time by increase or decrease according to population with excess land being returned to the province; and that present local reserves be conveyed to the province.

Accordingly, on August 18, 1875 the province responded to Canada by an Order-in-Council of that date, which:

> "... concur[s] with the statements and recommendation contained in the Memorandum of the [Attorney-General] ... dated Aug. 17, 1875, and advise that it be adopted as the expression of the views of this Government as to the best method of bringing about a settlement of the Indian Land Question."

In response, by Order in Council dated November 10, 1875, Canada proposed alternatives, none of which mentioned Indian title:

1) That a three-member Commission, consisting of representatives of both governments and a Joint Commissioner, be appointed.
2) The Commission would "fix and determine for each Indian nation (i.e. all tribes speaking the same language), separately, the number, extent, and locality of the Reserve or Reserves to be allowed to it."
3) There would be no fixed basis for determining acreage.

4) The Commissioners would be "guided generally by the spirit of the Terms of Union . . . which contemplated a 'liberal policy' being pursued," and they were to consider "the habits, wants and pursuits" of each nation, "the amount of territory available in the region occupied by them," and "the claims of the white settlers."

5) Each reserve would be held in trust for the use and benefit of the nation concerned, to be enlarged or diminished as population fluctuated. Additional lands would be allotted from Crown lands, and lands no longer required would revert to the Province.

6) Certain existing reserves would be surrendered to the Crown. (Ex. 1203-2; s. III, Tab 24)

British Columbia accepted this proposal and Canada abolished the Boards formerly established, and two new "superintendencies" (particularly Victoria and Fraser) were created. At the same time Canada approved a new **British Columbia Land Act,** enacted April 22, 1875 after Canada had disallowed the earlier **Act** in March of that year. The new **Act** was in most respects the same as the old **Act,** but it included a provision authorizing the reserve of unalienated lands for Indian, railway or other purposes.

The Minister of Justice, Edward Blake, had grave reservations about the constitutionality of the new **Act**. He wrote that he could not concur in the view that the Dominion's objections had been removed entirely by the agreement to establish an Indian Reserve Commission. He thought there were still:

> ". . . serious questions as to whether the Act . . . is within the competence of the Provincial Legislature, yet since according to the information of the undersigned the Statute under consideration has been acted upon, and is being acted upon largely in British Columbia, and great inconvenience and confusion might result from its disallowance and considering that the condition of the question at issue between the two Governments is very much improved since [November 1875], the undersigned is of opinion that it would be the better course to leave the Act to its operation."

But he added:

> ". . . that this procedure neither expressly nor impliedly waives any right of the Government or Parliament of Canada to insist that any of the provisions of the Act are beyond the competence of the Local Legislature, and are consequently inoperative." (Ex. 1203-2; s. III, Tab 28)

No further steps were taken to disallow the 1875 **Act.**

The three Commissioners were duly appointed in the summer of 1876 with Mr. Sproat as Chairman. In his Annual Report for the year ending June 30, 1876, David Mills, Laird's replacement, said:

> "The question of the rights of the Indians in all the lands in British Columbia in which their rights have not been extinguished by treaties between themselves and the Crown is still unsettled." (Ex 1203; Sec. III, Tab 41, p. xvii)

This was contrary to the view of the province that the "Indian Land Question" had been settled by the agreement to appoint Commissioners which, the province believed, would discharge its obligations under the Terms of Union by furnishing whatever additional land was required for reserves.

In September Lord Dufferin paid a visit to British Columbia and caused quite a stir by making some public pronouncements on the current Indian Land Question. Most of his speech was directed to the railway question. But at the end of his remarks he said that it had always been Imperial policy to recognize aboriginal title in Canada and that treaties with Indians were at that moment being negotiated by the Lieutenant Governor of Manitoba. He referred to the post-Douglas refusal of British Columbia governments to recognize aboriginal title as an "error." The following passages are taken from his address dealing with aboriginal title:

> "... From my first arrival in Canada I have been very much preoccupied with the condition of the Indian population in this Province. You must remember that the Indian population are not represented in Parliament, and consequently that the Governor-General is bound to watch over their welfare with special solicitude. Now, we must all admit that the condition of the Indian question in British Columbia is not satisfactory. Most unfortunately, as I think, there has been an initial error ever since Sir James Douglas quitted office, in the Government of British Columbia neglecting to recognize what is known as the aboriginal title. In Canada this has always been done; no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the lands we are dealing with, and having agreed upon and paid the stipulated price, often times arrived at after a great deal of haggling and difficulty, we enter into possession, but not until then do we consider that we are entitled to deal with an acre. The result has been that in Canada our Indians are contented, well affected to the white man, and amenable to the Laws and Government. At this very moment the Lieutenant-Governor of Manitoba has gone on a distant expedition in order to make a treaty with the tribes to the northward of the Saskatchewan. Last year he made two treaties with the Sioux and Crows; next year it has been arranged that he should make a treaty with the Blackfeet, and when this has been done the British Crown will have acquired a title to every acre that lies between Lake Superior and the top of the Rocky Mountains. But in British Columbia, except in a few cases where, under the jurisdiction of the Hudson Bay Company or under the auspices of Sir James Douglas, a similar practice has been adopted, the British Columbia Government has always assumed that the fee simple as well as the sovereignty resided in the Queen. Acting upon this principle they have granted extensive grazing leases and otherwise so dealt with various sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen's Indian subjects. As a consequence there has come to exist a very unsatisfactory feeling amongst the Indian population. Intimations of this reached me at Ottawa two or three years ago, and since I have come into the Province my misgivings on the subject have been confirmed. Now, I confess I consider that our Indian fellow-subjects are entitled to exactly the same civil rights under the law as are possessed by the white population, and that if an Indian can prove a prescriptive right of way to a fishing station, or a right of way of any other kind, that right should no more be ignored than if it was the case of a white man. I am well aware that

> among the coast Indians the land question does not present the same characteristics as in other parts of Canada, or as it does in the grass countries of the interior of the Province, but I have also been able to understand that in these latter districts it may be even more necessary to deal justly and liberally with the Indian in regard to his land rights even than on the prairies of the North-West . . ." (Ex. 1203-4; s. 8, p. xxvi)

The province takes great exception to these remarks, alleging that the Governor-General was misinformed about a number of matters upon which he spoke, and that he was exceeding his authority since he acknowledged in his speech that he:

> ". . . had not come on a diplomatic mission, or as a messenger, or charged with any announcement, either from the Imperial or from the Dominion Government . . . nor should it be imagined I have come either to persuade or coax you into any line of action which you many not consider conductive to your own interests . . ." (Ex. 1203-2; s. III, Tab 38, p. 409)

Later, Prime Minister MacKenzie confirmed:

> ". . . it was quite understood that he should not and could not, have any mission from the Dominion govt. of any ambassadorial function even as an Imperial Officer which might conflict with his Vice Regal duties here, and that his visit therefore was strictly a progress as Governor."

Nevertheless, the Governor-General's remarks probably expressed the view of at least some of the officials of the Dominion Government and there is a private minute dated November 2, 1877 in which Lord Carnarvon described His Excellency's speech as admirable ". . . in temper, taste, language and deserves every praise," but neither Lord Carnarvon nor any colonial official ever responded publicly or officially.

On September 26, 1876 Mr. Sproat wrote a long report to the Minister of the Interior. In his covering letter, dated 30 September, 1876, he noted that the first part of his Memorandum concerned "the question of the full Indian title to the Country [sic] and the supposed necessity of extinguishing such full title," a question that the Governor General had referred to "several times . . . in conversation and also publicly."

Sproat told the Minister of the Interior that the question should not have been raised in British Columbia, because there was little hope that "the Canadian Parliament" would vote the "enormous sum of money" which would be required for treaties, and because it raised the difficulty that the Indians, who were now aware of "the new principle," would ask the Reserve Commissioners about it as they went around the Province. Sproat asked for instructions in the matter. It was, he wrote:

> ". . . therefore necessary that the Commissioners should know what the Dominion really require, looking to these facts and to the nonexistence of any treaty Indians at all in British Columbia at present. If the Indians ask about this new principle what are the Commissioners to do?" (Ex. 1203-2; s. III, Tab 35, P. 14-16)

In his report Sproat described the "Indian Problem" as "almost insoluble," and he suggested that it might be necessary to ". . . persevere, if need be, through a succession of failures." He posed this question:

> "The practical question now is, does Canada propose to apply this principle of the full Indian title, in the land, to the Indians of British Columbia. If so, it is necessary that the Reserve Commissioners be

> instructed immediately to make treaties for the cession of the lands and as to what is to be given to the Indians for them . . ."

At the beginning of his Memorandum, Sproat adverted to the Governor-General's view "that Canada should not touch an acre of the soil of any acquired Territory, peopled, however scantily, by Indians, without having previously extinguished the Indian Title in a formal and satisfactory manner . . ." Sproat added that he would:

> ". . . carefully refrain from expressing any opinion as to this policy, for my mind is open on the subject, but I rather think this policy considerably differs from the policy of the Imperial Government with respect to the presumed title of the Indians of British North America to the whole of the soil of the Country which they inhabit."

As for what might be recognized by law, he observed:

> ". . . The law of nations and also, I imagine, the common law of England (in English colonies where it operates) would, if they could sue, be sufficient to secure to the Indians their cultivated fields, their constructed habitations, the amenities of their dwellings, also whatever they had annexed to themselves by personal labour." (Indians did have the capacity to sue in 1876: S.C. 1876, c. 18, s. 67.)

Commenting upon some of the same legislation and documents which are in evidence in the case at bar, Sproat observed that the Colonies of Vancouver Island and British Columbia had been created

> ". . . without a word being said about any Indian title to the soil,"

Sproat noted in particular:

> ". . . that Sir E. B. Lytton did not recognise any Indian title to the soil in his acts and speeches connected with the establishment of the Colony. Nor does it appear that Lord Carnarvon, his then under Secretary, did so in any of the Despatches which he wrote at that time, nor has an Indian title to the soil been admitted by any of Sir E B Lytton's successors, except of course their rights as English subjects above mentioned, which I presume the Indians might claim under the English Common law in British Columbia whether the English Crown recognised them or not."

Moreover, he observed:

> ". . . the British Parlt., in sanctioning the Union of British Columbia with Canada in 1871, did not declare that there was any full Indian title to be extinguished, and Canada herself, at that time, appears to have omitted to do so, tho' expressly agreeing, in the terms of Union, that the land should belong to the Province. Moreover, Canada stipulated for the grant of a large tract of land in British Columbia for railway purposes, but did not mention that there was any Indian title to such tract to be extinguished by the Crown, or by the Province. If I am right in my recollection of these several matters, it follows that England does not appear to have recognised any particular title, on the part of the Indians to the soil of the Western portion of the Continent, other than the right which subjects of the Crown may generally possess . . . The regions above described were dealt with by the Crown without any reference to the Indians . . ."

Sproat also said:

> "... that the Governments of England and of Canada differ considerably in their views of this question of the full title of the Indians to the soil, so far at least as the central and western portions of the North American continent are concerned ...
>
> The Indian policy of the Governments of British Columbia [sic] with respect to the Indian title to lands, has naturally been the same as the Home Government — the country having been mainly governed from England until 1871 when the Colony joined Canada."

Sproat concluded the Indians':

> "... legal rights of occupancy and possession of particular portions [sic] have been fully admitted, as also their equitable claim to an ample sufficiency of land for reasonable subsistence and progress."

The Dominion never issued instructions to the Indian Reserve Commissioners to enter into treaties, despite concerns expressed by the Minister of Finance that title to Pacific railway lands in British Columbia would be burdened by unextinguished "Indian title."

It appears from the Annual Report of the Department of the Interior for the year ending June 1877 that the Reserve Commission busied itself in 1876 and 1877 allotting reserves throughout the province, though there was some unrest in the interior awaiting the arrival of the Commissioners.

In July, 1877 Lord Dufferin was obviously apprehensive. He sent a private communique to Carnarvon:

> "I am sorry to say we have had rather uncomfortable news about the British Columbia Indians.
>
> As I have often had occasion to mention to you in my public and private correspondence, the B.C. Government has never dealt properly with its Indians. Instead of following the example of Canada, and buying up the aboriginal title, the whites in British Columbia have simply claimed the land as their own, and though they have made certain Indian reservations in various places a great deal of injustice has been perpetrated both in regard to their allotment, and the subsequent resumption of portions of them. Unfortunately, the Dominion Government have no legal power of interference, but by dint of a considerable amount of moral pressure exercised privately by myself, and 'semi'-officially by Mackenzie, we got them to agree to the appointment of joint commissioners who were to settle all disputes upon equitable terms.
>
> These gentlemen entered upon the discharge of their duties this spring, but of course, it is a long and tedious business, and though I understand they have dealt satisfactorily with some of the Indian bands, there are many others whose complaints they have not yet had an opportunity of examining. In the meantime the Yankee Indians in Idaho and to the south of our line, have risen into open rebellion, and have begun murdering and ravaging and the British Columbia Govt. have written to inform us that our own Indians are endeavouring to confederate with them. Consequently the isolated white population in the neighbourhood of Kamloops &c, and to the eastwards, is in considerable danger, and they suggest that we should send a hundred of our mounted police from

> the North West into British Columbia for their protection. This however it is impossible to do. In the first place our North West Police have more than they can manage where they are, what with Sitting Bull and his 8000 associates, and in the next we are going to make a most important Treaty with the Blackfeet in the Autumn, and it is necessary that our police should be in the neighbourhood where our red friends are about to congregate. Altogether the situation is very unpleasant, so far as our scanty information enables us to judge of it. Mackenzie moreover seems inclined to wash his hands of the whole affair, intimating that the B.C. Government have only themselves to thank for what is likely to happen . . .
>
> All this is very uncomfortable, but I do not see that I can do anything more than I have done. I am sure I spoke out strongly enough to the B.C.'s themselves, when I was there last year, warning them publicly in my speech of what the consequences would be if they did not deal more justly by the native population." (Ex. 1203-3; s. III, Tab 44)

Concern was also present in Ottawa, for on August 2, 1877 the Minister of the Interior (Mills) sent a telegram to the Indian Superintendent in Victoria:

> "Indian rights to soil in British Columbia have never been extinguished. Should any difficulty occur steps will be taken to maintain the Indian claims to all the country where rights have not been extinguished by Treaty. Don't desire to raise the question at present, but Local Government must instruct Commissioners to make reserves so large as to completely satisfy Indians. Present condition necessary consequence of British Columbian policy. Write you today. Send Governor Richards copy of this telegram." (Ex. 1203-3; S. III, Tab 45)

In his letter to Superintendent Powell of the same date (as evidenced by a draft), the Minister wrote that his telegram had indicated:

> ". . . the line which I believed the Government of Canada would feel themselves obliged to take if the Land Commissioners do not deal with the Indians of British Columbia in the most liberal spirit, completely satisfying them as to the extent of land set apart as reserves."

He then made several comments as follows:

> "In reading over some of the communications which you formerly sent to this Department, I observe that a policy has been pursued towards the Indian population of British Columbia wholly at variance with the course that it has been thought necessary to pursue towards the aboriginal inhabitants in every other part of the Dominion . . .
>
> Should anything so disastrous as an Indian war overtake the Province of British Columbia, I do not believe that the Provincial authorities would be permitted to deal with any portion of the lands claimed by the Indians until the Indian title had been first extinguished by making them reasonable compensation . . .
>
> I do not know whether the Government of Canada were fully aware of the condition of things at the time British Columbia was admitted into the Union whether they were aware that the Government of British Columbia had undertaken to deal with the public lands of that Province

> without first having extinguished the Indian title. But, however this may be, there can be no doubt whatever that no arrangement between the Govt. of Canada and the Govt. of British Columbia could take away the rights which the Crown has always recognized as belonging to the Indian natives.
>
> So far as I know, in no colony that the Government of Great Britain has established upon this Continent, with the single exception of British Columbia, has it been undertaken to dispose of the public domain without first having treated with the Indians for its possession. In the various colonies of New England, in Virginia, in New York, and in all the Southern Colonies, as well as those (with the exception named) which now form the Dominion of Canada, the proprietary rights of the Indians in the soil have invariably been respected.
>
> The Government have no desire to raise this question if it can be avoided; and, in my opinion, if the Government of British Columbia will instruct their Commissioner to deal with the Indians in the same liberal spirit that the Indians on the East side of the Rocky Mountains have been dealt with by the Government of Canada, there will be no necessity for raising it . . .
>
> The Government of British Columbia have retained possession of the waste lands of the Crown within the limits of the Province, but they have never extinguished the Indian title, nor have they made any provision for annuities to the Indian population. I have no doubt whatever, that as guardians of the aboriginal inhabitants of the Dominion the Government of Canada have the right to insist upon the extinguishment of their title before the Provincial Govt. assume absolute control of these lands; and if it becomes necessary, in order to prevent an Indian war, to assert this right on behalf of the Indians, there can be no doubt as to the course which it will be the duty of the Federal Government to pursue." (Ex 1203-3; s. III, Tab 46)

Finally, the Minister told Powell that he had not discussed the matter with his colleagues "with a view to entering into any discussion with the Local Govt. as to the Indian title to the Crown Domain in British Columbia," that he hoped it would not be necessary to do so, and that, moreover, he wanted Powell to ascertain British Columbia's views informally.

The Minister sent similar views to the Commissioners who had just settled with the "Shuswaps" and were then dealing with the "Okanagans." These Commissioners sent copies to the LieutenantGovernor advising that the Indians had not raised the question of "title to the soil." Sproat commented:

> ". . . as the question [of title] was not mentioned in our instructions from either Government, and I do not consider the above letter of the Minister as an Amended Instruction, but as an intimation of his opinion on a matter of great magnitude and importance in case events should bring it to the front." (Ex. 1203-3; s. III, Tab 51)

The Provincial Secretary replied to Sproat expressing the Government's wish that the Indians should be treated "justly but generously" and then added:

> "It is the most earnest wish of the Provincial Government that the Indians of British Columbia should be dealt with not only justly, but

> generously. The instructions issued to Mr. McKinlay, the Provincial Commissioner, conclusively prove that fact, — but at the same time justice requires that the interests of the old settlers of the Province should not be sacrificed.
>
> The Hon. Minister of the Interior gratuitously assumes throughout his letter that the Indian population of British Columbia has been treated, not only ungenerously, but, unjustly. The history of the Province however tells a very different tale, and it is undoubtedly the case that in no portion of Her Majesty's dominions has the native race benefitted so much by contact with the whites as in this Province: it may be added that the Indians in the neighbourhood of white settlements are better off, and receive higher wages when they work, than the ordinary European labourer.
>
> Before Confederation a discontented Indian could hardly be found in British Columbia, and the Indian title question, as you are aware, had no existence until raised during the past year by His Excellency the Governor General.
>
> It would be easy for the Province to charge the present discontent among the Indians to the policy of the Dominion Government, or at least to the manner in which that policy is put in operation, for it is an incontrovertible fact that the discontent and dissatisfaction have originated since the Dominion Government took charge of Indian Affairs in this Province." (Ex. 1203-3; s. III, Tab 54)

There were further communications, including one where Superintendent Powell reported that the province would prefer to convey all its public lands to the Dominion rather than to face the expense of following the policy advocated by it. Finally, at the end of 1877, Mr. Mills proposed that Sproat be appointed sole Commissioner, and this was done. He was eventually succeeded in that role by O'Reilly and then by Vowell.

In its report to the end of June 1877, the Department reported that "all causes of apprehension which existed in the early portion of the summer have now entirely disappeared, at least among those tribes whose land grievances have been considered and settled."

I pause to comment on the dialogue I have just recounted about "Indian title." Near the end of the colonial period, Mr. Trutch in his 1870 response to Mr. Seabright-Green's letter expressly denied aboriginal title. I cannot say if this was because he believed it was not a part of English colonial law, as Sproat later questioned, or whether he believed it had been extinguished by colonial legislation. It is possible he was just being stubborn, but that would not make him right or wrong.

It is one of the remarkable historical facts that the question was not resolve in all of the Confederation documents, and only s. 109 of the **British North America Act, 1867,** can be construed to touch on it, and then almost invisibly.

After that, the position of the province was consistently that there was no "Indian title," and confined itself to discussions about the size of reserves.

The Dominion and the Governor-General, on the other hand, with their experience confined to Royal Proclamation country, probably and understandably assumed that the British Columbia history was the same as Ontario, and accordingly pressed for treaties which for good reason is what had always been done there starting in the late 1700's and pursued more vigorously in the Robinson era commencing around 1850. I find it easily understandable that the Dominion officials, with their experience, would naturally assume that the Ontario regime should be imposed upon the Canadian west and, of course, the Dominion was free to impose that regime all across the prairies where there had never been a Colonial government.

The authorities make it clear that aboriginal land claims must be considered in their historical context. I conclude it would not be safe to assume that confident statements made by Dominion officials about "Indian title" should always be accepted as correct statements of law.

Similarly, the denial of the provincial officials cannot be so construed. These gentlemen were defending positions to which they were committed. I find their statements helpful because they create the historical context, but none of them are binding pronouncements of law.

Chronologically, I wish to mention the arrangements for the construction of the trans-continental railway which was commenced during Sir John A. Macdonald's second administration from 1878 to 1891. This has already been mentioned, and I do not propose to discuss it further.

Continuing the narrative during this historical period, I turn to activities in the territory. As mentioned earlier, trade goods began to flow into the territory from both the east and the west perhaps as early as 1800 but probably later than that. Trader Brown of the Hudson's Bay Company established Fort Kilmaurs on Babine Lake, outside the territory in 1822, and he actually made one or more visits towards the forks of the Skeena and Babine, but no further; Peter Skene Ogden travelled overland from the Company's establishments in the east to Moricetown in 1836; the Collins Overland Telegraph Company reached Fort Stager just north of Kispiox in 1866; the Hudson's Bay Company opened a post, briefly, at what is now Old Hazelton at the forks of the Skeena and Bulkley Rivers in 1866; and there was undoubtedly some, though not much, "European" traffic, through the main river valleys which were largely the preserve of the Indian traders such as the legendary Legaik and his successors who more or less controlled the middle Skeena up to at least mid-century.

All that started to change at that time, partly because of the Omineca gold rush which provided employment for the Indians as packers at which they had become proficient even though horses were unknown in the territory until telegraph construction in 1865. Also in 1871 the government in Victoria sent surveyor Edgar Dewdney into the heart of the territory with instructions to:

> ". . . post notices on all lands occupied or claimed by the Indians in the country through which your explorations may lead you and take such notes of them as will enable you to lay them down roughly on your plan."

Dewdney planned a small townsite at the forks of the Skeena and Bulkley Rivers. There is a dispute about whether he actually laid out a reserve for Indians, and I do not think it matters much. He said in his report, "a portion of it I have reserved as a townsite, the remainder as an Indian Reserve for a tribe called Kit-en-macs." It is likely that the usual follow-up work was not done, and records are incomplete, but a reserve was later definitely established at more or less the same location. In 1891 O'Reilly saw a reserve noted on the north end of Dewdney's townsite plan, so he laid out a reserve with specific boundaries.

O'Reilly's letter of instructions as an Indian Reserve Commissioner, dated August 9, 1880, suggests that Dewdney may have been acting informally in 1871. O'Reilly's instructions were in the following terms:

> "I have the honour to enclose, herein a copy of an Order in Council of the 19 Ulto. appointing you to the position of Indian Reserves Comr for the Province of British Columbia . . . In allotting Reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Governments which contemplated a 'liberal policy' being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of their Reserves as well as in all other matters; informing them also that the aim and object of the Government is to assist them to raise themselves in the social and moral scales so as ultimately to enjoy all the privileges and advantages enjoyed by their white fellow subjects . . .
>
> The Government considered of paramount importance that in the settlement of the land question nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may specially attached . . ." (Ex. 1266-3; Tab 67)

I pause to mention that this kind of liberal language is found in many documents which I have examined. It appears that in their paperwork, at least, the provincial officials were seeking to observe the spirit of the Terms of Union, but there is considerable doubt about whether such instructions were always carried out on the ground.

In the meantime, there was considerable unrest and agitation on the Skeena. I have already mentioned the accidental fire at Kitsegukla in 1872 which led to threats of reprisal by the Indians and their being summonsed to attend before the Lieutenant-Governor, the killing of Youmans over a misunderstanding at Hazelton in 1884, and the killing of Kitwankool Jim, leading to the short-lived "Skeena Uprising" in 1888.

These somewhat dramatic events are probably not as significant as what was happening in the area generally. I have already mentioned the missionary Duncan. He established a Mission amongst the Tsimshian Indians of the coast at Metlakatla in 1862. In 1864 he was given notice of a "Government Reserve" for mission purposes of 5 miles on either side of Mission Point, and 5 miles back from the shoreline of which the 2 acres at the Point were to be held in trust by the government for the Church Missionary Society.

In 1882 J.W. MacKay, a Dominion Agent appointed to live at Metlakatla, and his Superintendent Powell arrived there to apply the Dominion **Indian Act,** but they were told by Duncan that the Indians wanted nothing to do with the government. Duncan told Powell, according to Powell's report:

> ". . . their [Indian's] rights were long prior to the Indian Act — in fact to the title of the soil, they had never been conquered, nor had they

> disposed of their rights to the land by treaty or otherwise . . ." (Ex. 1203-4)

Although Superintendent Powell was aware of a dispute between Mr. Duncan and Bishop Ridley, he was surprised by the information that he received from Mr. Duncan. There was a hurried exchange of written messages in which the Indians confirmed Mr. Duncan's statements that the Indians claimed to own these lands, and Powell replied that the title to all public lands was vested in the Queen and that he would enforce the **Indian Act,** etc.

During their conversation Mr. Duncan also informed Powell that O'Reilly, the Reserve Commissioner, ". . . would find serious opposition when he began work again on the Skeena." In fact, Mr. Tomlinson, an adherent of Mr. Duncan working among the Gitksan, had made the same suggestion to Mr. Vowell in a letter dated February 27, 1884.

The Provincial Government directed Commissioners to inquire into the "disturbances and breaches of the law at Metlakatla" and their report, dated October 28, 1984 assigned four causes of "disquietude":

1. The claim of the Indians to have recognized their title to all the land;
2. The severance between Mr. Duncan and the Church Missionary Society;
3. The fact that the two acres at Metlakatla, known as Mission Point, is not part of the Tsimpsean Indian Reserve; that it is at present in the occupation of Bishop Ridley as temporary agent for the Church Missionary Society, to which Society it was promised some twenty years ago by Governor Douglas, at the instance of Mr. Duncan;
4. The Indian Council at Metlakatla. (Ex. 1203-4)

Noting that "the question of Indian lands is constitutionally settled by the **British North America Act, 1867** (an Imperial statute) and the Terms of Union between British Columbia and Canada," the Commissioners' view was that:

> ". . . the idea of the existence of an Indian title and of its non-extinguishment in British Columbia originated in remarks made by Lord Dufferin when, as Governor-General, he visited British Columbia in 1876 to discuss the claims of British Columbia against the Dominion. Those remarks, which the Commissioners believe were wholly foreign to the mission of the Governor-General, have been sedulously inculcated in the Indian mind by some of the missionaries, who appear to have been ignorant of the constitutional law upon the subject." (Ex. 1035-80)

The Commissioners considered that a "great and perhaps an original impetus to the notion of Indian title" had arisen from the dispute between Duncan and the Church Missionary Society, and observed that ". . . there were no such troubles for the nineteen or twenty years previously to the severance . . ."

Furthermore, the Commissioners stated:

> ". . . the Nass Indians and the Skeena Indians have been moved to take the stand they have regarding the lands, by reason of the example set at Metlakatla; and while expressing this opinion, the Commissioners do not forget Lord Dufferin's utterances, and the communication of them to the Indians." (Ex 1203-4)

They recommended that the two-acre reserve at Metlakatla should be surveyed as government land. Such a survey, they thought, would "be recognized by the native mind as the assertion of the right of the Queen, as represented by the British Columbia Government, to the lands of the Province . . ."

In 1884 Mr. Tomlinson delivered a petition from "the Chiefs and principal men of Kitwingach (Kitwanga) alleging:

> "From time immemorial the limits of the district in which our hunting grounds are have been well defined. This district extends from a rocky point, called 'Andemane' (Andimal) some two and a half or three miles above our village on the Skeena river to a creek called "She guin-khaat' [Chig-in-kaht], which empties into the Skeena about two miles below Lorne Creek. We claim the ground on both sides of the river, as well as the river within these limits; and as all our hunting, fruit gathering and fishing operations are carried on in this district, we can truly say we are occupying it." (Ex. 1033-8)

In April 1885 Mr. Tomlinson wrote a long letter to Sir John A. Macdonald suggesting there was a risk of an Indian outbreak because of, amongst other reasons, some statements made by O'Reilly in 1881 at the "mouths of the Nass and Skeena that the government would not recognize an Indian or family title except by way of reserves." The government sent Mr. Tomlinson's letter to the province for its information. The Superintendent was in receipt of a number of similar communications in that year 1885 which sound remarkably familiar these 105 years later. The province has collected some of these communications in its argument as follows:

(1) One, dated April 27, was from Port Simpson Indians who noted that they had previously sent letters to the Dominion Government about their land through Superintendent Powell, but that they were now sending a representative directly to Ottawa. They wanted to know ". . . if the Government says we have no land . . . ," and if so, when and how the government got it. (Ex. 1203-4; s. V., Tab 16)

(2) Another, dated May 15, was written on behalf of the Metlakatla Indians, who also complained that no answer had been received to earlier letters sent through Powell, and noted that they were sending two representatives to Ottawa. The letter referred to Lord Dufferin's speech in Victoria, and asked if government considered that they had no rights in land outside their reserves. They had heard about treaties elsewhere in Canada, and asked for similar treatment: "We want the Government to treat with us about our land." (Id. Tab 17)

(3) A letter dated 18 May, written by William Duncan on behalf of the Metlakatla Indians, was concerned almost entirely with complaints about unfair treatment by the Church Missionary Society, Bishop Ridley, and the Inquiry Report. The Dominion's interference and protection was invoked in respect of British Columbia's attempt to survey the two-acre reserve at Mission Point: "We have therefore concluded in vindication of our rights to bring the subject of our land claims before you, trusting that the Dominion Government will see justice done us"; and, "We are anxious to have this question settled. We are also waiting to hear if we have a sure foot-hold on the land of our fathers, and if the law of England and the British law and people will

sanction the recent act of the Provincial Government or not." (Id. Tab 18)

(4) Duncan himself wrote to the Superintendent General of Indian Affairs on June 19, noting that 3 northwest coast Indians had been sent as delegates to the Dominion Government to ask for its assistance with various complaints, including the village site at Metlakatla. He pointed out that the Indians had "no treaty with the Government in reference to their lands." With respect to lands outside the reserve, he wrote: "These lands the Indians are willing to surrender to the Government as other Indians in other places have done. And they desire to be treated with by the Government as other Indians have been treated..." (Id. Tab 19)

(5) In a later letter to the Deputy Superintendent General of Indian Affairs, dated 20 July 1885, Duncan attempted to bring into focus one of the actual questions at issue in this case. Describing the Indian land question in British Columbia as "anomalous," Duncan first addressed the question of Indian reserves, citing:

a) the 18 August 1875 Report of the Attorney General of British Columbia concerning the allotment of reserves;

b) the 19 January 1875 Memorandum of the Deputy Minister of Justice respecting Crown lands in the province; and

c) the 2 November 1874 Memorandum of the Minister of the Interior on the subject of the allotment of reserves. (Id. Tab 21)

Mr. Duncan did not refer to the Joint Indian Reserve Commission agreement embodied in the Dominion Order in Council of November 10, 1875 and British Columbia Order-in-Council of January 6, 1876. As for lands outside reserves, Duncan urged the Dominion to contest the position taken by the Government of British Columbia, saying that, "All the Dominion Government will have to do in such case ... is to fall back upon Constitutional and Imperial Edicts and usages." After citing Trutch's January 1870 Memorandum which denied that Indians in British Columbia owned the "fee" in the lands, and Bernard's January 1875 Memorandum asserting that Indians had "some species of interest" in the lands of British Columbia, Duncan closed by asserting:

> "It must be now very evident to the Dominion Government that the Provincial Government will grant nothing to the Indians they are not compelled to grant ... It is to be hoped this very vital land question involving Indian title will be frankly met and settled at once by the action of the Dominion or if necessary Imperial authority, in the interests of peace and prosperity of the Province."

In 1886 the Dominion Government received representations from the Aborigines Protection Society in London questioning the claim of the province to control all of the land in the province. The Governor General in Council responded by approving a Report by the Superintendent General of Indian Affairs who stated:

> "...the Government of British Columbia, both while it was a Crown Colony and since, has always dealt with the lands in that Province as belonging to the Crown, the Indians being as little disturbed as possible and allowed to pursue their accustomed avocations. That when British Columbia joined the Dominion the General Government assumed the

> charge of the Indians, and an arrangement was made by which sufficient reserves should be set aside for the native tribes. That in accordance with this arrangement Commissioners have been appointed and many reserves have been laid out and sanctioned by the Government of British Columbia. That every disposition has been shown by both Governments to protect the rights of the Indians, although in some cases the central Government felt itself bound to differ from that of the Province, but these cases have been or will be, the Minister has no doubt, satisfactorily adjusted, and the Aborigines Protection Society may rely upon it that sufficient areas will be provided for the use and comfort of the Indian Bands." (Ex. 1203-4; s. V., Tab 27)

In September 1886 attempts were made to survey the reserve at Metlakatla but the surveyors met with passive resistance from Indians and a gunboat was dispatched to ensure that the survey could be completed. In response to Dr. Helmcken's suggestion that the difficulty be resolved by appointing Duncan the Dominion's Agent at Metlakatla, Sir John A. Macdonald, who had earlier insisted that the survey be completed, said that because Duncan was:

> ". . . resisting the law and claims the whole country for his Indians, it is impossible to appoint him. No one more highly appreciates Mr. Duncan's great service to the Indians than I, but like Oliver Cromwell and other great men, he seems to have lost his head and aspires to unrestricted dominion." (Id. Tab 31)

As a consequence of the difficulties at Metlakatla the province immediately appointed a further Inquiry Commission (the Cornwall-Planta Commission) on which the former was appointed by the Dominion and the latter by the province. The Attorney-General instructed the province's representative not to discuss the title question and sent a copy of his instructions to Cornwall.

Complaints continued on a regular basis, and the Dominion government seems to have resigned itself to the provincial position. For example, in February 1887 the Prime Minister wrote to a Toronto clergyman:

> "The position of the Indians in that Province is in a very unsatisfactory state. The British Government, when B.C. was a Crown Colony, treated the Indians with liberality, but did so merely as a matter of grace. The Indian title to the soil had never been admitted there, and before and since the union with Canada Reserves were laid out by the Government there for various tribes or Bands of Indians according to the Government's discretion. I believe that on the whole these Reserves were granted on a liberal scale, more in fact than the Indians could use or occupy, though I am personally cognizant of instances to the contrary. By the Land Laws of the Province all the lands undisposed of to private individuals belong to the Crown — that is to the Provincial Government — and their legislation has given certain rights to Whites in the way of pre-emption, Explorers rights &c, without any regards to whether the lands were occupied by Indians or not. It was in order to prevent an unscrupulous horde of American miners pouring into British Columbia and taking possession of the Mining districts with a strong hand and with the connivance if not the assent of the Provincial Government, that the Indian Dept. has endeavoured to secure sufficient tracts of country for the Indians before they are squatted on by Whites. The setting aside

> of a reserve if it be of a sufficient area is the only protection the Indians have. By the arrangements with the Province at the time of the Union, which arrangement has the force of law, sufficient reserves were to be set aside by agreement between the two Governments, and after the surveys were confirmed, the land laws of British Columbia would cease to have effect and no settler could gain any claim or right under them. In several cases where White men had acquired rights before the establishment of a reserve the Government had either to buy them out or leave them in possession to the great injury of the Indians who are apt to be corrupted by these interlopers.
>
> Hitherto there has been comparatively little trouble with respect to Indian Reserves except at Mettakahtta . . . The Provincial Courts will doubtless maintain the legality of the land laws and the letter obtained under them, and I am satisfied their judgment will be upheld on appeal, so that Mr. Duncan has done great disservice to the people he wishes to protect by his resistance to the law. The whole subject is one of great importance and must be dealt with very carefully. Unfortunately the administration of law, civil and criminal, rests with the Provincial Government, and as the Indians are under the guardianship of the Dominion Government the former slights its duties and endeavour to throw the burden of the management of the Indians on us here and cares only to sell as much land to the Whites as possible, without any real regard to the injustice which may thereby be done to the Indians. Before Spring opens this subject must be dealt with, and the only solution which is apparent just now is the acceptance by the Indian Bands of sufficient Reserves to which they will then have an inalienable title, in the same way for instance as the Six Nation Indians have in Ontario." (Ex. 1203-5; s. V., Tab 36)

Again, it seems to me, the issues of law arising in this case cannot be decided by the opinions of the Prime Minister, or anyone else.

On July 8, 1887 a Dominion Order-in-Council referred to several important questions remaining unsettled and invited British Columbia to send a representative "clothed with full powers to settle all such outstanding questions." The specified "questions" were:

1) the allotment of reserves where Crown land had all been taken up by settlers, such as at Soda Creek, Douglas Portage and the Old Caribou Road;
2) the right of Indians to natural water for irrigation on their reserves;
3) the sale by the province of lands which had been allotted to Indians;
4) the title of the Dominion to reserves allotted by the Commission;
5) the use of provincial constables and goals for those convicted under the **Indian Act;**
6) the disposition of fines collected for infractions of the same **Act;**
7) the construction of lockups in isolated locations; and
8) the payment of expenses for preserving the peace on reserves. (Ex. 1203-5; s. V., Tab 40)

The province argues significance in the fact that Indian title was not one of the questions mentioned. The province appointed John Robson, its provincial Secretary, to settle these questions. Agreement on most of them was reached.

The Cornwall-Planta Commission reported its findings on November 30, 1887 by which time Duncan had removed himself and some members of his congregation to Alaska. The Commission found that the title question was of interest only to some Indians, and suggested that such interest depended upon exposure to certain religious persons. They reported that such claims "... require attention by Government, and the sooner the better."

Mr. Cornwall, the Dominion's Commissioner sent a copy of the Report to the Superintendent General of Indian Affairs, and expressed his confidential opinions in an accompanying letter. After reciting the events which led to the split between the Church Missionary Society and Duncan, Cornwall wrote:

> "... ever since the dismissal of Duncan by the C.M.S. — (Church Missionary Society) there has been neither rest or peace, but that on the other hand the Indians following Duncan ... became imbued with ideas which before were unknown to them ... And the whole affair is disastrous in its consequences. It has unsettled Indian's minds throughout the whole of the N.W. of British Columbia. It has led to any amount of so called religious animosity and strife even between members of the same tribe. The idea first started at Metlakatla during the contest between the Bishop and Duncan that the title to all Provincial lands was vested in the Indians has spread to an alarming extent, and is now really the basis upon which the natives found their complaints and demands. That is to say the disaffected ones, and they are numerous, do so; but it is encouraging to note that such is not the case with all ..." (Ex. 1203-4; s. V., Tab 32)

Cornwall went on to suggest that claims to aboriginal title seemed to depend upon which religious group influenced the Indians. He mentioned, in particular, Robert Tomlinson, who was "about to establish himself on the Skeena River," and "... who is a great mischief maker and who under the guise of religion has done much to foment the difficulties and disaffections which have sprung up."

On the question of Indian title, Cornwall wrote:

> "... It has long been determined that Government cannot in any way allow this. There is no ground for the assertion that the fee of the lands ever rested in the natives. Although in many parts of the old Province of Canada the Indian title was, as it is called, extinguished by the farce of purchasing the same for infinitesimally small sums, and a like course has been pursued in the North West Territories, yet it has not by any means been done all over those provinces, and where it has been done it was only, I conceive, because it was deemed politic and expedient to do so. No doubt it would have been politic and expedient so to do in the Province years ago, but it was not done, and now, one would say, it is impossible to do it. The mere idea of the necessity of such a course invalidates at once every title to real property in the country, although these titles have been granted by the Crown ..."

As to the nature of the Indian interest in lands, he observed:

> "The Indian in his wild state has no idea of property in or title to land. He only knows his right to live on it in common with others. He has and makes only a very partial use of it. He has no definite boundaries within which he claims. His ideas with reference to it are of the most vague description. He believes in his right to his own house and improvements of whatever kind and personal property generally but beyond that the beasts of the field have as much ownership in the land as he has. The present method of dealing with the Indians in this respect is as proper and fair a one as can be devised. Give them their proper reservations, their village sites — the lands which they can utilize now and in time to come — their fishing stations — their parcels of ground commanding wild hunting ranges — but as far as the land is concerned it is impossible to go beyond this. Let them so understand . . ."

In Cornwall's view:

> ". . . the Dominion and Provincial Governments should confer together on this matter, considering it really of the utmost importance, and, in their wisdom, determine on some course which shall have the effect of allaying the discontent and misconceptions on the part of the Indians above alluded to. Most of the other matters brought before the commissioners were of a more local nature, having reference to size of reserves &c: and will fall more within the competence of the local government and the Indian reserve Commissioner."

I pause to mention that Mr. Cornwall would be severely criticized today for his comparison with the "beasts in the field" which is so clearly unacceptable by today's standards, but I am persuaded that he was completely correct in describing the historical "farce" of buying peace for "infinitesimally small sums," which was common in other parts of the country.

I mention these matters about Mr. Duncan and the difficulties at Metlakatla not to raise an **ad hominum** argument, for it does not matter how Mr. Duncan or those with whom he interacted chose to characterize aboriginal interests, but merely to provide a chronological framework for this historical review.

During the year 1887 J.S. Helmcken, one of British Columbia's three Confederation delegates wrote 2 discourses about events in the early days of the colony which put an interesting light on some of the early events, particularly that Douglas got assent for 6 of his early "treaties" in one "compulsive-impulsive" session with a group of chiefs; that the Governor had nothing to do with these treaties; and he described the early policy of the colony in the following terms:

> "It was the 'policy' of the Govt. of Vancouver Island not to remove any tribe or family from their village sites — but to make reserves of land immediately around and including their habitations. The Indians to-day occupy the same sites as they did when I first arrived in 1850. None have ever been removed and so by the same token have never been removed to "reserves', using this term in the Canadian or American sense. It was never intended that the Indians should be a separated community. It was hoped that by living in the proximity of the whites and under the same law, they would learn from their civilized

> neighbours how to work[,] how to get work and generally to become civilized and to a considerable extent this happened.
>
> It must therefore be evident that the Indian policy of Vancouver Island differed altogether from that of Canada. In fact it was knowingly framed seeing the great disadvantages of that system. There was no intention whatever of subsidizing these Indians and making them paupers and mendicants. The object was to make them earn their living . . ." (Ex. 1203-5; s. V., Tab 33)

In the Report of the Dominion Department of Indian Affairs for the year 1887 it was stated with respect to the negotiation of "certain questions" with the Provincial Secretary:

> "Several unsettled matters affecting the Indians of this Province which required the co-operation of the Governments of the Dominion and of the Province to bring them to a satisfactory conclusion formed subjects for consideration and adjustment last autumn, the Government of British Columbia having, at the suggestion of the Dominion Government, dispatched a delegate to Ottawa to confer in respect to all such matters. The Honourable John Robson, the Provincial Secretary, was appointed delegate for the above purpose and he came vested with the necessary authority to act for his Government in arranging a final settlement of all questions at issue, and this was effected in a manner satisfactory to both Governments. It may, therefore, be stated that there are now no outstanding questions which have not either been settled or which are not in course of settlement on a basis agreed to by the Dominion and the Provincial Governments." (Ex. 1203-5; s. V., Tab 48)

Nevertheless communications of complaints continued to be received both by the province and the Dominion. In August 1887 Commissioner O'Reilly of the Indian Reserve Commission went to the north-west coast and met with Indians at various locations including the Nass fishery at Stoney Point, Kit wil luc shilt, Iayennis (now, probably, Ainainish), Metlakatla, Fort Simpson, and other locations. His notes (Ex. 1203-6) make fascinating reading, particularly his repeated request to the Indians to let him know what lands they wished; but generally the story was the same. The Indians claimed either huge reserves and payment for all lands outside their reserves, or just the former, and declined to participate in the process if they did not receive a favourable response. Mr. O'Reilly repeatedly urged the Indians to tell him what they required in the way of land, forestry resources and fishing stations, but often to no avail.

As is so often the case, however, the two cultures do not always communicate well with each other. This is demonstrated by the fact that the Indians had asked for a commitment from the government about the Indian title question in the Cornwall — Planta proceedings. In a letter to Mr. Powell dated August 17, 1888, Mr. Planta described this as follows, saying that he:

> ". . . emphatically and definitely refused to entertain the Indian claims to ownership of the whole country, and in this the honourable Mr. Cornwall on behalf of the dominion Government fully concurred and so expressed himself to the Indians so that on that question, or grievance the Indians have received an unmistakeable [sic] answer from both governments but certain Indians demurred to it and reiterated their claims of 'Indian title,' and these are probably awaiting a

> further and what they may regard as a more direct answer from the Government." (Ex. 1203-6; s. V., Tab 53)

Mr. O'Reilly found Mr. Planta's comments to be true, for several Indians told him they did not wish to say or do anything until they heard from the government, even though Mr. O'Reilly told them he was giving them the government's answer. In addition, of course, there is always a wide gulf of misunderstanding in these matters, and it is not possible, just from reading Mr. O'Reilly's notes, to know precisely how each of them were being understood, or misunderstood, by the other.

The Dominion did ultimately make a written response to the Indians, under date of October 23, 1888, which was simply that the Dominion,

> ". . . did not propose to recede from the agreement entered into with the Govt. of British Columbia [at Confederation], in accordance with which agreement suitable Reserves were to be allotted to [the various bands], and the residue of the public lands was to be handed over to the Provincial Govt to be disposed of in such manner as by that Govt might be considered proper." (Ex. 1203-6; s. V., Tab 55)

In July 1889 the Dominion, at the request of the province (which had received such a request from the Indians), appointed an Agent to reside at Hazelton on what was called the Upper Skeena. The first incumbent was R. E. Loring who was then in the service of the province in the area. He seems to have been nominated for this position either by the Indians or by Mrs. Hankin, the widow of the first merchant at Hazelton whom Mr. Loring later married. She, being either an Indian woman or at least fluent in their language, acted as his translator. His many reports present a useful account of the Indians of the territory during his service there which continued until about 1920. In many cases, his reports present a far more realistic picture of what was happening on the ground than the careful language of government reports and diplomatic exchanges.

Loring's 1889 reports describe a society in transit from what he regarded as "heathen," such as eating dogs and potlatching, and many disputes. He wrote:

> "Destitution is very prevailing among the Indians of all the villages I have visited. In some cases actual distress, and pitiful to see." (Ex. 1209-A4)

In the winter of 1889-90 Loring found the Indians of Hagwilget and Kisgegas in their winter villages in the woods a few miles from the river. He understood this site was selected for defensive purposes following a massacre of the villagers by the Nishga, though no date was given. He reports that he was able to assure them that their best land was not going to be taken away from them as they believed. To bring reality into this account it should be mentioned that the temperature was 20 degrees below zero F. His early 1890 Reports on visits to Kuldo detail serious shortages of food, all dried salmon stocks having been exhausted, and the populace living on their cache of potatoes, with violent cases of diarrhoea, as well as reference to many disputes about fishing stations with the fortunate Indians prohibiting others from getting any salmon. It is difficult to believe their condition would have been any better in a completely aboriginal society, but we shall never know the answer to that question.

Also in 1889, the Church Missionary Society enquired further about the question of Indian title to which the Deputy Superintendent General (a Dominion official) replied under date of July 3, 1889, stating in part:

> "In connection with the land question, which involves the Indian title to the lands generally in the Northern part of British Columbia, the letter from the Missionary Society quotes as authority for the recognition of the Indian title the purchase made by Sir James Douglas of tracts of land from various tribes of Indians. Upon reference to these purchases, which are entered at large in the book compiled by the Hon. Mr. Trutch containing papers in connection with the Indian land question from 1850 to 1875, it is found that Sir James Douglas negotiated these purchases with the Indians not as Governor of the Colony but as Agent of the Hudson's Bay Co. with a view no doubt to facilitate the trading relations of that Company with the aborigines of the country . . .
>
> In regard to the question of the Indian title to the lands generally of the Province the Commissioners' report [Cornwall-Planta] contains the following remarks:
>
> 'The idea of the existence of an Indian title and of its nonextinguishment in British Columbia originated in the remarks of Lord Dufferin when as Governor General he visited British Columbia in 1876 to discuss the claims of British Columbia against the Dominion. Those remarks which the Commissioners believe were wholly foreign to the mission of the Governor General, have been sedulously inculcated in the Indian mind by some of the Missionaries who appear to have been ignorant of the constitutional law upon the subject.'" (Ex. 1203-40; s. V-3, p. 8-11)

The Deputy went on to point out that ample reserves had been established for the "Tsimpshean" Indians by Mr. O'Reilly and that the allotment of reserves was "as practical an answer as could have been given to the Indians . . . claiming additional territory."

Loring's first annual report dated 30 June 1890 shows the population and occupations by village as follows:

Kitwanga — population 140 (39 dwellings) — freighting, coastal canneries, and trapping

Kitsegukla — population 83 (21 dwellings) — no occupations given — there is a note that 41 younger band members moved to New Kitsegukla

Gitanmaax (Hazelton) — Band Population — 61 Total Population — 233 (55 dwellings) — freighting, packing, mining, logging, coastal canneries

Kispiox — population 236 (34 dwellings) — freighting, packing, coastal canneries

Kisgegas — population 260 (23 dwellings) — hunting and trapping

Kuldo — population 33 (6 dwellings) — hunting and trapping (Exhibit 1209-A-10)

The first representative of the Reserve Commission, A. W. Vowell, arrived in the territory in August 1890. He found that the Indians were expecting to have their lands taken away by the government and he learned at Hazelton that the Indians had been advised not to let surveyors or government officials come up the river. He had a meeting with Chief Gyetum Galdoo, one of whose successors is a named plaintiff in this action. Vowell explained how they had been misled, and he noted that this "more than pleased them." He was able also to quieten the Kispiox Indians and he says they promised to give Mr. O'Reilly and his staff, who were on their way up the Skeena, a good reception and every possible assistance in laying out their reserves.

Later that month or possibly the next year (the documents are confusing) it rather appearing O'Reilly was in the mid-Skeena in both years), Commissioner O'Reilly laid out reserves at Gitenmaax (Hazelton), Hagwilget, Moricetown, Babine Lake, Kispiox, Kitsegukla and Kitwanga, but many of the people were absent fishing and he stayed in each location for only a brief period. There are notes of meetings at several centres where Mr. O'Reilly explained his function, and various chiefs made representations about particular lands which they wished to have reserved. In an exchange at New Kitsegukla where he laid out 3 reserves, O'Reilly, on September 30, 1891, said the government:

> ". . . have not allowed pre-empt to be taken in the neighbourhood of villages least it sh[oul]d interfere with the rights of the Indians, but after the reserves are defined this prohibition will no longer exist, therefore I wish you to tell me where your fisheries, timber, and village sites are. I will include their principal fisheries, in the immediate neighbourhood, but there is a special Act which prohibits white men from fishing in fresh water therefore the fisheries are virtually all the Indians', and it is not necessary to make a reserve of every little place where an Indian fishes.
>
> I hope you will not ask an unreasonable extent of country, but only for that which would be useful to you. It is not necessary that the berrying or hunting grounds should be reserved. It would be an impossibility to define them as you go over hundreds of miles. You will not be confined to the reserves, but can hunt fish or gather berries where you will as heretofore." (Ex. 887-10)

Apparently O'Reilly had difficulty at Kispiox where some Indians wanted a reserve 35 miles in length following the course of the river and including the mountain ranges on either side, and I gather his work was not allowed to be continued there. He warned them that if a white man took possession of their lands, presumably by pre-emption, "they would have no one to blame for it but themselves."

He also had some difficulty at Kitwanga where the claim was repeated for 35 miles of river (for 141 people), and there were very few Indians present but those who spoke included one who expressed fear that they expected to be confined to reserves for a few years and then be driven off "and the land taken by the whites." O'Reilly gave strong assurances that such would not occur. He defined four reserves but he did not consider that he had finally dealt with this band and he returned in September 1893 and created 3 further reserves.

On the other hand, at least one band was expecting a railway to be built and urged him, in 1892, to have their lands surveyed without delay.

In 1891 Loring reported the population of Hazelton had increased to 237 with 62 dwellings, compared with only 7 buildings in 1871. He said Hazelton was "swelling by the conflux of members of other bands, who through the inducements of the facilities in finding employment, settled," and that the entire village of Moricetown was planning to move there but he was able to persuade them not to do so.

Also that year Loring reported:

> "As far as I know, all the Bands are satisfied in respect to the defines of their Reserves, with the exception of that of Kiss-pioux. There has been a report spread, that a movement is on foot, to make the Indians buy the land. This greatly excited even those, who are very well satisfied on the Reserve question. I am overwhelmed with interrogatories on the subject. This emanates from intermeddling. As far as I can find out, it is the old Met-la-Kat-la spirit propagated to the Skeena, lacking entirely in force, yet serving as a means to confuse the Indians." (Ex. 1209-A-17)

Again, I tend to doubt the accuracy of Loring's conclusion that most Indians were "satisfied" with the reserves that had been allocated to them, but it may be true that they did not communicate their dissatisfaction to him, or perhaps to anyone. Until recently they tended to keep such matters to themselves.

The Report of the Superintendent General of Indians Affairs for 1891 reported:

> "From one end of the province to the other prosperity and contentment reigned among the Indians during the past year. Even on the north-west coast, where but a few years since considerable difficulty was experienced in managing the Indians, owing to exaggerated ideas instilled into their minds as to their land rights by evil counsellors and mischiefmakers, actuated no doubt by sinister motives, the Indians having become pacified and assured that the Department was doing all it could for them, tranquillity undisturbed prevailed during the year." (Ex. 1203-6; s. V., Tab 67)

In September 1893, O'Reilly returned to the Upper Skeena where, at Kitwanga, "the usual extravagant demands were made", vis. "fr. Kitsequkla to below Lorne Creek," but there were only 19 persons present and I doubt whether anyone was satisfied with the process. O'Reilly's Reports make it clear, however, that he did establish quite a few reserves, 12 for the Hagwilgets, 3 for the "Kissequklas", 4 at Hazelton, etc.

In 1896 O'Reilly received 2 letters from Kispiox Indians apologizing for the way he was treated and asking him to return to enlarge their reserve. It does not appear this was done as Mr. Loring replied that a large reserve of over 200 forested acres plus the townsite had already been laid out, and he recommended against a further visit.

The reserve allocation process continued at least until 1911 when the province adopted a temporary policy of not establishing any further reserves.

Throughout the 1890's Loring's reports contain many accounts of his efforts to settle disputes between Indians over hunting and fishing opportunities at many locations.

As in many kinds of litigation, it is almost as if the parties were leading evidence in different lawsuits. The plaintiffs endeavoured to show that the social structure of the Indians, particularly the chiefs and the feast hall, governed the lives of the Indians, yet there is much evidence, including Mr. Loring's reports, which indicates otherwise. It is impossible to conclude that the hereditary chiefs were the sole arbiters of grievances in the face of Mr. Loring's reports which have the advantage of being prepared long before there was any thought of litigation.

Loring reports visiting the Gitksan fishing village of Ksun a total of 31 times starting in 1894. It is up-river from Kispiox, but south of Kisgegas. He reported it was the "congregation centre" for fishing of the Gitenmaax and Kispiox where many disputes arose requiring his attention. In 1897 Loring predicted:

> "the time is not far off when Ksun will be abandoned altogether. The Indians are steadily improving their ways of living, in conformity to which the present mode of inhabiting it will prove inconsistent." (Ex. 1209-A-77)

In 1913 Loring wrote:

> "Regarding the Kit-Ksuns on the Skeena above Kis-piox, I here must mention, that commencing the winter before last, not a few of Kuldoe and of Kis-ge-gas began gravitating towards Kis-piox, and indications present the semblance of their eventually becoming habitants of the latter village.
>
> If such practice should continue a natural process of concentration of those Indians nearer to Hazelton will come about, and am inclined to the opinion, that for obvious reasons the result become much desirable. The facilities of profitable employment, — both summer and winter, — which nearer here afford, is the factor.
>
> The deductions are that as by degrees those increase as expedients, hunting and trapping as resources, will wane correspondingly.
>
> These conditions are approaching by bounds and will more than all else prove the remarkable acquisitiveness and fertility of ready recourse with which the Kit-Ksuns are possessed for the better."

Notwithstanding this, in 1913, he described Ksun as the "principal fishing centre", and in 1916 as the "principal stock of fish for the winter supply" and that "upon these fisheries the people of several villages depend for their winter supplies." In his last report on Ksun, however, he mentions that the inhabitants were mostly older people, and the quality of fish caught and cured was 80% less than in earlier times owing to a change in diet. I do not recall Ksun being mentioned as a village in the plaintiffs' evidence nor do I recall it identified on Mr. Morrell's maps, even though he and his staff interviewed most of the elders. This movement towards the population corridor is consistent with the impression I have of the emptiness of the territory.

In 1898 interest quickened in reaching a treaty with the Indians of the North West Territories. This first arose in 1891 upon the discovery of "immense quantities of petroleum" and other minerals but British Columbia was not included in the contemplated area to be settled. Interest revived in 1898 when the Indian Commissioner of the North West Territories recommended a treaty covering the "Provisional District of Athabasca and North Western British Columbia." To this the Secretary of the Department of Indian Affairs noted in the margin "Indians of B.C. already dealt with by arrangement with BC Govt. in 1876," referring, I suppose, to the agreement to establish a joint Indian Reserve Commission.

It was then decided that it would be impractical to exclude the Indians of north-east British Columbia east of the Rockies, and although the province was notified of the intentions of the Dominion, it never formally acquiesced in the treaty although it did not object, and Treaty No. 8 was signed in 1898. The "adhesion" of British Columbian Indians east of the Rockies to the treaty was obtained from time to time, the last ones probably being the Fort Nelson Indians in 1909. I do not find it safe to draw any inferences from this sub-history. It was a practical accommodation — another anomaly — and it bears little relevance to the questions I have to consider in this case. The land required for reserves was furnished by the Dominion out of the Railway Block which it had received as part of the Railway arrangements, and the province did not contribute any land.

Also, in 1898, Vowell replaced O'Reilly as reserve commissioner. In that year Vowell established reserves at Kuldo, Kisgegas (229 persons), and further reserves at Kispiox. Vowell's minutes show that at Kisgegas on July 28, 1898 he said:

> "... the reason that reserves are made is that no white man can take them from you. You are not confined to your reserves and do not interfere with your liberty. You can hunt and shoot everywhere." (Ex. 1040-118)

The economy of the area changed greatly with the survey for and construction of the Grand Trunk Pacific Railway in the late 1890's and early 1900's. Many Indians obtained employment on these projects. Prior to the railway, the traditional seasonal round was gradually disappearing to be displaced over time by a cash or wage economy. This happened first among the central Gitksan, and slightly later at more distant locations such as Kuldo, Kisgegas, and with the Wet'suwet'en. Trapping continued as an important, but decreasing, part of the economy of the area until the failure of the fur market in 1950. Prices soon recovered but few Indians are presently engaged in that vocation although they have largely maintained their trapline ownership.

Loring started to comment in 1900 about the trend away from the old communal longhouses to single family residences.

In 1891 or 1892 O'Reilly reported on reserves for the Hagwilgets, as they were sometimes known, saying that as they occupied "scattered settlements from the Hagwilget river to Fort George, on the Frazer [sic] river, a distance of about two hundred miles, the greater number of the reserves for these Indians have not therefore been dealt with."

He mentioned some Hagwilget reserves:

> No. 1., Moricetown, "... about thirty-five miles from the mouth of the Hagwilget river. The principal village of the tribe, consisting of 18 houses, is at this place and has, according to the census supplied by the local Agent, a population of 76, of whom Legoul is the chief." He also said, "The most important fishery of the band is immediately in front of the village; here great quantities of salmon are annually taken," and "Although there is a considerable extent of good land on this reservation, nothing has been done for its improvement, or utilization, excepting only that a few potatoes and vegetables are grown in isolated patches."
>
> No. 2: "... about two miles from Moricetown; and is used by the Indians as a winter run for horses.
>
> No. 3: "... situated on the Frazer Lake trail, about five miles south of Moricetown, contains 160 acres, the [larger] portion of which is good hay land." (Ex. 1239B-93)

He went on to describe the excellent hay lands to the south, but I conclude from his failure to allot reserves that they were substantially unoccupied, although he added that he expected they would some day be brought under cultivation.

I pause to mention that **Cail** on p. 226 reports total reserve allotment in the province, by 1897, of 718,568 acres (compared with 28,437 at Confederation) of which only 44,631 were in the Babine Agency which included more than just the territory. This 715,568 acres exceeds the total amounts mentioned in Walkem's 1875 Memorandum, but only 197 of these Babine acres was said to be under cultivation.

The most significant development in the territory occurred in the first few years of this century when the white settlers started to take up some of the best agricultural land in the territory, particularly in the Bulkley and Kispiox valleys. This resulted partly, from the railway, and partly from the issue of Boer War script which permitted returning soldiers to pre-empt land, some of which was used or occupied by Indians. I have no doubt some serious injustices were perpetrated upon some Indians who were dispossessed from land they were using, often by speculators who were permitted to take assignments of script from soldiers for nominal amounts.

In 1905 Loring reported the southern area of the territory was virtually empty, with no one living on Francois or Ootsa Lake and scattered families at Cheslatta Lake, which is outside the territory.

The absence of evidence of villages in the Wet'suwet'en area is surprising. While there were at least 8 named villages in Gitksan areas, I only recall mention of 2 named Wet'suwet'en villages. These are Hagwilget, which is in Gitksan territory, and Moricetown. In addition there was mention of a few settlements such as Barratt Lake near Moricetown and other settlements further south on the Bulkley River. There were also villages on Babine Lake which is outside the territory.

It is apparent, however, that the Indians, while accepting whatever benefit they found in the reserves, never ceased claiming a much larger land interest. Some hearings were held in July 1909 in Smithers, and a July 15, 1909 "Victoria Times" account of some of those proceedings, read into evidence by Mr. Galois, probably records the position of the Indians of the territory:

> "Commissioner Stewart of Ottawa who came here accompanied by Superintendent Vowell of Victoria, and Chief Constable O'Connell of the Dominion force, to inquire into the grievance of the local Indians arising out of the settlement by white settlers of Crown lands outside of the Indian reserves, which the Indians had been using for themselves for generations, completed the hearing of the trouble last night after a two day session. The proceedings were confined to a hearing of the Indian grievances and their demands for redress. Each tribe was represented by a spokesman, who presented each tribe's troubles and demands in turn, each spokesman practically repeated what the first one set forth. Basing their contention on the assumption that all the land belonged to them to be hereditary and that whites had taken it without conquest or remuneration they practically asked that the whole country be surrendered to them. This would involve dispensing with the present system of reserve, the establishment of their ancient tribal laws and customs for the government of the territory and the forfeiture of all rights, claims and interests of the whites, et cetera, practically the establishing of the conditions existing before the white man came among them. While the claims were made separately for the surrender of each tribal chief's lands of his forefather's, collectively it would involve the entire country." (Ex. 1026-298)

Similar claims were advanced periodically, and there are conflicting reports from Loring of tension and agitation increasing and decreasing. There was a serious incident in 1909 centred upon Kispiox with a threat of an attack on Hazelton, which led to the "Kispiox Raid" (by 50 police officers who made 8 arrests). Another incident was recorded where McDougal was unable to conduct surveys at Andimaoul and Kitwankool in 1910 as some of the tribes agreed " . . .to accept no reservations until a decision had been arrived at as to their claim to the whole country. They are afraid that the acceptance of a reserve would invalidate their claim." Commissioner Green returned to the Skeena and Kispiox valleys in 1911 and reported that the Indians:

> ". . . were unanimous in refusing to have any reserves defined for them; their claim that the whole country belongs to them and that they would not accept anything less, was a repetition of the argument advanced by the Indians at Andimaul last year." (Transcript, p. 31,443, 1. 27-33)

This particular problem was sought to be resolved in 1912 by Green being authorized to give an assurance ". . . that whatever outcome there may be to their claims for the whole territory that in any case the chosen spots which are necessary for their use should be secured to them." These are undoubtedly white persons' words which may not have meant much to the Indians.

By 1910 Loring reported that land claim agitation had died down but the old people had not abandoned the idea, and by 1916 he wrote that ". . . in general, the situation regarding the land question has entirely subsided." I think Mr. Macaulay was correct when he submitted that the following conclusions can be extracted from the Loring reports:

(1) The Gitksan traditional economy was not providing adequate subsistence for the population of the central and western villages by 1890.

(2) The northern villages, Kisgegas and Kuldo, where the traditional economy was still in place, were starting to lose their population by 1902. The winter hunting and fishing villages, and the outlying canyon fisheries were abandoned.

(3) The traditional economic activities, fishing, hunting, and trapping, were losing their central position in the lives of the Gitksan and Wet'suwet'en as other economic alternatives were taken up.

(4) Disputes between families and crests over fishing stations and trapping and hunting grounds were frequent and continued throughout the period of Loring's tenure as Indian Agent.

(5) Traditional methods of dealing with ownership and claims to ownership of fishing stations, smokehouses, trapping and hunting grounds, if any, were no longer employed.

(6) The Gitksan of central and western Skeena, particularly Gitenmaax, Kispiox, Kitsegukla, Kitwanga and later the Wet'suwet'en, started joining the cash/wage economy in the later years of the last century.

(7) Society in the central and western villages, and later in Hagwilget and Moricetown, were increasingly based on family units, housed in single family dwellings.

Meanwhile, paper continued to fly between Ottawa and Victoria regarding the treatment of the Indians. The Dominion government supported the province, particularly in matters of law and order, such as when Indians prevented surveys, and in connection with the Kispiox Raid, but it continued to seek a solution to the ongoing agitation. One suggestion was to have the Supreme Court of Canada settle the issue of Indian ownership, but the province declined to participate in that plan.

In response to a 1911 delegation in which the government received a memorial signed by the "Chiefs and representatives of nearly all the tribes throughout the province," Premier McBride told the delegation "... the Indians had no title to the unsurrendered lands ..." and that there was no question to submit to the Courts.

The Prime Minister and his Ministers were also under heavy pressure from the Indians and others. In response to another 1911 delegation Sir Wilfrid Laurier said:

> "... the Dominion Government is in the position of guardian of the Indians," and, "If the rights of the Indians are impaired it is for the Dominion Government to look after them and protect them."

But he added:

> "The matter for us to immediately consider is whether we can bring the Government of British Columbia into Court with us. We think it is our duty to have the matter enquired into. The Government of British Columbia may be right or wrong in their assertion that the Indians have no claim whatever. Courts of Law are just for that purpose, — where a man asserts a claim and it is denied by another. But we do not know if we can force a Government into Court. If we can find a way I may say we shall surely do so, because everybody will agree it is a matter of good government to have no one resting under a grievance. The Indians will continue to believe they have a grievance until it has been settled by the Court that they have a claim, or that they have no claim." (Ex. 1203-7; s. VIII., P. 73-74)

The Dominion then caused the **Exchequer Court Act** to be amended even though Indians had status to bring proceedings since 1876, and the government resolved to bring proceedings but did not do so and matters rested there for nearly a year. Then, in May 1912, the Dominion appointed a Special Commissioner, J.A.J. McKenna, to investigate claims by Indians in British Columbia and all other questions at issue between the two governments. He undertook an extensive study of the problem and wrote a long letter to Premier McBride dated July 29, 1912. After defining the Indians' claims ("aboriginal title") he made a significant concession. He said:

> "As to the first claim, I understand that you will not deviate from the position which you have so clearly taken and frequently defined, i.e., that the Province's title to its land is unburdened by any Indian title, and that your Government will not be a party, directly or indirectly, to a reference to the Courts of the claim set up. You take it that the public interest, which must be regarded as paramount, would be injuriously affected by such reference in that it would throw doubt upon the validity of titles to land in the Province. As stated at our conversations, I agree with you as to the seriousness of now raising the question, and, so far as the present negotiations go, it is dropped." (Ex. 1203-8; s. VIII., Tab 14)

McKenna reviewed the history in a way not unfriendly to the province, pointing out that aboriginal claims had been settled differently in different parts of Canada, and he observed:

> "The records of the Reserves Commission prove that the policy of the Thirteenth Article of the Terms of Union, and not that of the Agreement of 1875-76, was followed in allotting reserves. The wishes of the Indians were consulted, as they had been in the days before the Union; their village sites and enclosed fields and their fishing places, were, as had always been the practice, secured to them. Their reasonable wishes and ascertained requirements formed, as it had thereto formed, the measure of the further land allotted." Ex. 1203-8; s. VIII., Tab 14, p. 30)

While it was McKenna's original view that a new Commission was unnecessary, on September 24, 1912 he signed an Agreement with the Premier for a 5-member Commission to "adjust the acreage of Indian Reserves in British Columbia" (plus or minus, or entirely new reserves), and for the ultimate conveyance of reserves to the Dominion which had always been a difficult point of contention between the governments.

In his Report to the Dominion on his agreement with the Premier, McKenna pointed out:

> "There have been reserved for Indians in British Columbia some seven hundred and fifteen thousand acres of land. Taking the Indian population as shown by the report of 1911, viz., 21,600, the allotments average about thirty-three acres per capita. There is, however, a very striking inequality of allotment, the per capita allotment in one Indian Agency being under two acres, in another over one hundred and eighty four. And the difference in acreage of allotment is apart altogether from difference in values of lands allotted . . .
>
> The undersigned considers the agreement to be in the best interest of the Indians of British Columbia as well as to the public advantage." (Ex. 1203-8; s. VIII., Tab 15, p. 5)

One of the important terms of the Agreement was the abandonment by the province of its claim to the reversionary interest in reserves no longer required for Indian purposes. Such term had been a serious impediment to all discussions with the Indians and with the Dominion.

There can be no doubt the Agreement, which was accepted by both governments, was directed to Term 13 of the Terms of Union, not to the "title" question which, as Mr. McKenna said, had been "dropped." In fact, a subsequent Dominion Order in Council dated June 1913 made it clear that ". . . the agreement . . . does not contemplate an investigation and settlement of matters appertaining to general Indian policy in British Columbia . . . It is confined to matters affecting Indian lands which require adjustment between the parties."

The limited scope of the McKenna-McBride Agreement did not go unnoticed. In 1913 the Nishga Indians adopted a statement asserting their intention to persist in making a claim against the province for past alienation, and to control unalienated portions of the province. Later that year they addressed a Petition to the Imperial Privy Council claiming exclusive possession, occupation, use and sovereignty over lands in the Nass valley. They alleged that nothing in the Terms of Union or the McKenna-McBride Agreement took away any of their rights.

The Nishga petition eventually found its way to the Dominion Government which agonized over what to do with it, and with the continuing problem. The Deputy Superintendent-General Duncan Campbell Scott, who regarded the Nishga claims as "fancies" and "exaggerated," proposed that the claim be referred to the Exchequer Court, with a right of appeal to the Privy Council, on four conditions:

> "1. The Indians of British Columbia shall, by their Chiefs or representatives, in a binding way, agree if the Court, or, on appeal, the Privy Council decides that they have a title to lands of the Province, to surrender such title, receiving from the Dominion benefits to be granted for extinguishment of title in accordance with past usage of the Crown in satisfying the Indian claim to unsurrendered territories, and to accept the finding of the Royal Commission on Indian Affairs in British Columbia, as approved by the Governments of the Dominion and the Province as a full allotment of Reserve lands to be administered for their benefit as part of the compensation.
>
> 2. That the Province of British Columbia by granting the said reserves as approved shall be held to have satisfied all claims of the Indians against the Province. That the remaining considerations shall be provided and the cost thereof borne by the Government of the Dominion of Canada.
>
> 3. That the Government of British Columbia shall be represented by counsel, that the Indians shall be represented by counsel nominated and paid by the Dominion.
>
> 4. That, in the event of the Court or the Privy Council deciding that the Indians have no title in the lands of the Province of British Columbia the policy of the Dominion towards the Indians shall be governed by consideration of their interests and future development."
> (Ex. 1203-8; s. IX., Tab 9, p. 5)

This proposal was adopted by the Dominion Government by Order-in-Council PC. 751 on June 20, 1914. Various communications within government make it evident there was concern about the cost of extinguishing all claims. Moreover, it was realized the Nishga believed "... the disposal of the provincial lands would be in their hands if the case were decided in their favour by the Courts."

It is difficult to understand how the Indians could have been expected to accept this process because it required them to agree to litigation which, if they succeeded, would be compromised by the reserves then being adjusted by the McKenna-McBride Commission. Apparently they saw it that way and rejected it in a prepared statement delivered in February 1915. Their response is interesting because it included a counter-proposal which shows they based their thinking very much upon the **Royal Proclamation, 1763,** and upon the terms and conditions of every treaty made by the Crown with all other Indians in Canada. Their counter-proposal was stated in the following terms:

> "1. That when the findings of the Royal Commission are known, each tribe that may consider such findings insufficient shall have opportunity of making application for additional lands to be reserved for the use and benefit of the Tribe for reasons to be stated in such application, and every such application which cannot be dealt with by conference between the Tribe and the two Governments shall be decided by His Majesty's Imperial Minister, the Secretary of State for the Colonies, in pursuance of the principle embodied in Article 13 of the 'Terms of Union.'

> 2. That in fixing compensation regard shall be had to all the terms and provisions of any treaty made between the Crown and any Tribe of Indians in Canada.
>
> 3. That in fixing compensation regard shall also be had to all restrictions and disabilities imposed upon Indians by Provincial Laws and those imposed by Canadian regulations relating to the fisheries.
>
> 4. That all remaining matters, including an equitable method of fixing compensation, shall be adjusted by enactment of the Parliament of Canada." (Ex. 1203-8; s. XV., p. 23)

The usual discussions ensued between the Indians and the Dominion Government without any progress being made, and after receiving a joint memorandum from the Minister of Justice and the Superintendent-General which began by noting that "ample opportunity for discussions had been afforded," and that the question was "thoroughly debated," the Government rejected the Indians' counter-proposal and resolved:

> ". . . after due and careful consideration, that the terms of the order in Council of 20th June, 1914 [PC 751] be not modified or altered." (Ex. 1208-8)

But the Indians were advised that the proposals of P.C. 751 "remained open."

It is apparent from the documents that P.C. 751 remained the policy of the Dominion at least until 1927, although efforts were made to negotiate fresh arrangements without success. In most of the proceedings of the McKenna-McBride Commission the Indians attempted to raise the question of Indian title, but the Commissioners were instructed not to discuss it. Instead they often gave assurances that participation in the reserve process would not prejudice such claims which would, they said, ultimately be resolved in Court. Notwithstanding such assurances, many Indian tribes, including some in the territory and the Kitwankool Indians, participated indifferently, if at all, in the adjustment process.

The Report of the McKenna-McBride Commission adjusting the reserves throughout the province was accepted by both the provincial and Dominion governments in almost identical statutory language. The provincial enactment, S.B.C. 1919, c. 32 provided:

> "1. This Act may be cited as the 'Indian Affairs Settlement Act.'
>
> 2. To the full extent to which the Lieutenant-Governor in Council may consider it reasonable and expedient, the Lieutenant-Governor in Council may do, execute, and fulfil every act, deed, matter, or thing necessary for the carrying-out of the said Agreement between the Governments of the Dominion and the Province according to its true intent, and for giving effect to the report of the said Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.
>
> 3. Without limiting the general powers by this Act conferred, the Lieutenant-Governor in Council may, for the purpose of adjusting, readjusting, or confirming the reductions, cut-offs, and additions in respect of Indian reserves proposed in the said report of the Commission, carry on such further negotiations and enter into such further agreements, whether with the Dominion Government or with the Indians, as may be found necessary for a full and final adjustment of the differences between the said Governments."

The results of these adjustments in the territory were not significant.

There followed further serious efforts by the Dominion to obtain the agreement of the Indians to the Report, including a series of unsuccessful meetings in Victoria in 1923 in which the province declined to participate. The Indians were then standing firm on a proposal they had made in 1920 which the Dominion had found unacceptable. As a consequence, Scott felt constrained to recommend the acceptance of the McKenna-McBride Report. He wrote:

> "With reference to the question of litigation, they wish to be considered as willing to have a settlement out of Court, but if it seems impossible to get a fair and equitable settlement they wish to 'press on to the Judicial Committee of the Privy Council.'
>
> In spite of this vigorous protest from the Indians as to the acceptance of the report of the Royal Commission, I cannot, with a due sense of responsibility and having the best interests of these people at heart, recommend any other action but the adoption of the report. The Indians will receive in the aggregate a large acreage of reserve lands free from any vexatious claims of the Province, such as the so-called 'reversionary interest' has been in the past. While it is true that in some districts it would have been more satisfactory if larger reserves could have been set aside for them, conditions peculiar to British Columbia rendered that almost impossible, but the report of the Royal Commission provides reserves for these Indians which can be developed and utilized by them. Over against their complaint that they have not sufficient lands, we must set the statement, often well founded on fact, that they are not making good use of the lands provided for them." (Ex. 1203-13, p. 71)

The Dominion Government then by Order in Council P.C. 1265, approved July 19, 1924, confirmed the McKenna-McBride Report in the following terms:

> "... the Royal Commission, as set out in the annexed schedules, be approved and confirmed as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfilment of the said Agreement of the 24th day of September, 1912, and also of Section 13 of the Terms of Union, except in respect to the provision for lands for Indians resident in that portion of British Columbia covered by Treaty No. 8 ..." (Ex. 1203-12; Tab 14, p. 3)

The Province also implemented the Report by an appropriate Order-in-Council.

In 1926 Parliament received yet another Petition, this one from the Allied Indian Tribes of British Columbia, which requested steps be taken for defining and settling all issues required to be decided between the Indian tribes and the governments by the Imperial Privy Council. The Indians requested that their petition be referred to a Select Committee for consideration.

There was a reference to a Select Committee which held some hearings and submitted its report to Parliament in June 1926. The Committee concluded:

> "Having given full and careful consideration to all that was adduced before your Committee, it is the unanimous opinion of the members thereof that the petitioners have not established any claim to the lands

> of British Columbia based on aboriginal or other title, and that the position taken by the Government in 1914, as evidenced by the Order in Council and Mr. Doherty's letter above quoted, afforded the Indians full opportunity to put their claim to the test. As they have declined to do so, it is the further opinion of your Committee that the matter should now be regarded as finally closed." (Ex. 1209-3; s. XII, p. x)

I understand the reference to 1914 refers to P.C. 751 of that year.

In addition, however, the Committee recommended that, in lieu of a treaty under which subsidies are paid to many tribes in Canada, the British Columbia tribes should receive an annual payment of $100,000, (increased in 1979 to $300,000), distributed per capita, and this payment has been paid by Canada to British Columbia Indians each year since 1926. The Report of the Select Committee was approved by resolutions of both the House of Commons and the Senate in 1927 but, not having been passed in statutory form with Royal Assent, these resolutions express only the view of Parliament and do not have the force of law.

After 1927, and probably from P.C. 1265 in 1924, Canada treated all questions as between British Columbia and itself as finally settled. This was demonstrated by the fact that Canada has actually purchased additional lands required for reserves from the province.

In response to a further petition from the Kitwankool Indians in 1934 asserting "aboriginal title", the Assistant Indian Commissioner for B.C. wrote to the Hazelton Indian Agent, under date of February 19, 1934, as follows:

> ". . . any question relating to Indian lands in British Columbia was dealt with by Parliament as a result of an investigation made by a Special Joint Committee of the Senate and House of Commons appointed to enquire into the claims of the Allied Indian Tribes of British Columbia as set forth in their petition submitted to Parliament in June, 1926.
>
> The Report and evidence of the Special Joint Committee submitted to Parliament was printed by Order of Parliament by the King's Printer in 1927 and copies were subsequently sent to all Indian Agents and to all leading Indians in British Columbia wherever these were found to have shown an interest in the proceedings reported on. Each Indian Agent was requested by the late Commissioner to make known to the Indians the contents of this Report and explain to the Indians who received copies anything therein which might seem to be ambiguous or calling for explanation. I have no record as to whether or not the late Agent carried out the instructions of the Commissioner but in reply to the present enquiry I would refer you, as well as the Kitwancool Indians, to the Report above mentioned, and would state that so far as this office may be concerned, the Indian Land Question, so called has been finally disposed of by legislation in the Parliament of Canada as a result of the Report of the Joint Committee, such action having been taken by Parliament under authority vested in the Parliament by virtue of its powers under the British North America Act.
>
> The Royal Commission on Indian Affairs dealt with the land situation of the Kitwancool Indians to the very best of their ability but they did not get the full support of the Indians . . .

> Kindly advise the Kitwancool Indians if necessary that it will be useless for them to submit petitions to this office along the same lines as those which they have submitted in the [p]ast for if they do they will be referred to the action taken as above stated by which their aboriginal claims are considered to have been reasonably met."

While the foregoing is not strictly accurate, for there was no legislation confirming the Select Committee Report, it probably represents the position Canada has taken on the ground, although Canada has not always asserted, and did not argue in this case, that all aboriginal interests have been extinguished.

So firm was the Dominion, however, that all questions had been resolved, the Parliament in 1927 actually passed legislation aimed at prohibiting anyone from assisting in the financing of Indian Land Claims. This provision was not repealed until 1951 with the passing of **The Indian Act** (1951) S.C. c.29.

I do not consider it necessary to mention anything else which occurred between 1927 and the commencement of this action in 1984, except that the reserves in British Columbia were ultimately conveyed to Canada, after all had been surveyed, by B.C. Order-in-Council #1053 dated July 29, 1938 (the Peace River and Railway Belt lands and reserves were conveyed earlier).

Particularly, I do not find it necessary to discuss various policy statements made by Canada since **Calder** reflecting a changed Federal attitude to Indian land claims, or indeed the recent statements made by the province in that connection. These are political matters which do not bear upon the resolution of the legal issues which arise in this case.

## Summary

I have by no means covered the historical record with the thoroughness of counsel who furnished much more extensive detail than I have attempted to describe. I have included enough to provide an historical background for the discussion of the law which follows.

It seems to me that there has always been much uncertainty about the true nature of "Indian title" in the province. Even some Indians have not always been completely consistent because there are references in the historical record to suggestions that enlarged reserves were their primary concern. In this respect, of course, the speakers, whoever they may have been, did not speak for anyone but themselves. I think it is fair to conclude that the basic position of most Indians, at least since about 1880, was that the various Indian tribes or peoples owned all or most of the province.

As I have pointed out, the Imperial and colonial officials, while recognizing aboriginal interests in village sites, etc. did not believe there was any impediment to the settlement and development of the colony.

After Confederation, Dominion officials also seemed to recognize an aboriginal interest less than ownership but its dimensions were not clearly articulated. Certainly it did not prevent the Crown, as advised by Dominion officials, from accepting transfer from the province of immense blocks of land for railway purposes. I can only conclude, even prior to the decision in the **St. Catherine's Milling** case in 1888, that the Dominion officials believed Indian interests were subject to the pleasure of the Crown, but they also though the province "should" buy up such interests. They seemed to think such could easily be accomplished, perhaps because of the success they were experiencing in Ontario and on the prairies.

Eventually, in 1912, the Dominion officials agreed to "drop" the question of "Indian title" during the negotiations about reserves, but continued thereafter to seek the agreement of the province to have the larger question resolved by litigation.

It is not difficult to summarize the position of the province. Before and after the creation of the colony of Vancouver Island the Hudson's Bay Company and the Colony acquired some lands by treaty. This was confined to Vancouver Island, may have been confined in some cases to lands adjacent to villages, and may have been motivated in part by concern for the safety of the settlers. Since Confederation, the position of the province has been consistent, even unyielding, on the question of "Indian title," but less unyielding about reserves.

In my view there is no profit in seeking to assign blame from such a great distance. It is timely and appropriate that these question should now finally be resolved. This judgment is the necessary first step in that process.

As already mentioned, I do not consider myself bound by historical statements made either by Indians or Crown officials about questions of law. I am not persuaded any of them spoke with a complete understanding of either the law or the facts, and the law to-day is much different from what it was just a few years ago. For example, these men all spoke without the assistance of authorities such as **Calder, Guerin** and **Sparrow.** Also, Indians and officials could honestly have been wrong, or even wrong-headed in some of the statements they made while still having an honest belief in what they said. I find no need to judge the conduct or the **bona fides** of any of the participants in this history.

My responsibility is to apply the present law to the facts as I understand them. I do not propose to attempt a reconciliation of all the different views and activities of the Indians and historical actors who shaped the course of the province before and since Confederation. Further, it is not my responsibility to fix blame although I shall continue to express views about the consequences of some of the policies and activities of both the Indians and the officials.

This period also saw the continuation by the Indians of a claim for some kind of Indian interest; the allotment and adjustment of reserves; some specific injustices; the gradual confrontation by the Indians of the cash and wage economy; and the efforts of the two governments to settle the "Indian question."

It does not really matter whether the missionaries inspired the dispute, and Loring's reports and observations have only historical, not legal importance. What is important is that a serious legal question which had been identified in the colonial period continued to be pressed by the Indians while the governments could not agree on a solution and made alternative arrangements by the use of successive reserve commissions.

Looking at the "Indian Land Question" only from the perspective of reserves, it is necessary at this late date to be careful in assessing the fairness of the result of the reserve allocation process. As shown, Indian populations in the territory were small, and although some fairly large reserves were established, (some being hundreds of acres), most were quite small particularly where access to the fishing sites was the primary consideration. The reserves did, however, include village sites and some surrounding areas including the crucial canyons where fishing was most productive. In addition, the Indians were promised that they were not required to live on reserves and could hunt and fish on vacant Crown land.

Having regard to the fish economy which furnished most of the subsistence requirements of the Indians, it was thought small reserves at village and canyon sites were sufficient, and the policy was to give Indians whatever other land they were actually using. I suspect the process may not have been sufficiently understood to be translated into actual fairness, as many of the Indians were away fishing when the commissioners came to their villages. There were at least 20 known cases of real injustice through pre-emption dispossession in the territory, some of which are still remembered by elders who gave evidence at trial.

The actual reserves, at the present time, are shown on Ex. 1243-D, (Map 2). There are said to be 62 reserves in the territory. Most of the Skeena River from Kitwangak to Kitsegukla is included in Reserves, as is much of the Skeena from Hazelton to several miles north of Kispiox. There is quite a large reserve at Kisgegas, but nothing north of Kuldo on the Skeena. There are several reserves in the Bear Lake area and upwards of 30 reserves in the south-east. Many of the reserves in these two last-mentioned areas are administered by Bands other than the Gitksan or Wet'suwet'en.

In such a huge land much larger reserves should have been set aside for the use of these indigenous peoples but there are many suggestions that, at the time of the McKenna-McBride Agreement, they were not always using the land they already had. After the adjustments brought about by the McKenna-McBride process, which were not significant in the territory, the plaintiffs' total reserves comprise about 45 square miles.

I suspect Wilson Duff is correct in his **Indian History of British Columbia,** when he said at p. 61, that the Indians "... not being farmers ... did not ask for very much ..." He even suggested that in no case did they ask for more that 10 acres per family but that may not be strictly correct because some Indians in the territory claimed reserves stretching for 35 miles or so along the Skeena. In addition to reserves, however, it is necessary to keep in mind the annual substantial cash and service payments and allowances which have been paid to or for Indians. The Indians deeply resent both the form and the quantum of these "benefits" which, both provincially and nationally, amount to billions of dollars annually.

While I have the sense that the Gitksan and Wet'suwet'en may be substantially better off than many aboriginal people in British Columbia, (largely because of the generally prosperous local economy based mainly upon fishing and the forest industry in which many of them have worked), they remain socially and economically disadvantaged.

I recently recall hearing Mr. Miles Richardson, a spokesman for the Haida nation being interviewed. He was asked why his people have become so active in land claims and he only replied "Have you seen how my people live?"

Without intending any offence, I have driven through some of the reserves which demonstrate disadvantages, and I have witnessed first-hand how some of them live. It is interesting to note that housing on reserves seems to be much better where there is (or was) a payroll such as from the sawmill at Kitwangak.

The most distressing evidence I heard during the entire trial was firstly the evidence of young Chief Glen Williams (Ax Gwin Desxw) of Kitwangak who said that the High School drop-out rate for his people, that is the percentage of students who do not complete High School, is 80%, and secondly that the saw mills at Hazelton and Gitwangak are closed or closing.

The latter is ruinous in the near term which may somehow be overcome; the former is ruinous in both the near and long term, and irremediable. Mr. Williams also mentioned other priorities such as housing, a treatment centre for alcohol and drugs, and a fishing by-law as well as education.

The most obvious wisdom I heard was from Mr. R. M. McIntyre, who has been employed by Canada working with Indians since 1956. He said:

> "... in my opinion I would say that the biggest — that the biggest problem facing these people today is one of lack of economic opportunity, and I think if they had a — if they had an improved economic circumstance that many of their — of their social problems might be lessened.
>
> THE COURT: I have heard in this evidence — in this case evidence about employment, which I gather would be included within your category of economic opportunity. I have heard about education, housing, alcohol and drugs, health, gambling. I dare say there are others. Could you rate them as degrees of seriousness, or is that a reasonable request to make?
>
> A. Well, bearing in mind that the last several years of my career have been oriented to things of an economic development nature, I don't know as I'm now really that qualified to comment on their social circumstance. I observe what appears to be considerable improvement of that. For instance, I see a number of good quality homes that have sprung up. I see — I see community halls and recreation facilities that have come into existence, I am aware that band councils are apparently taking on greater responsibility, I see a decline in the number of offices of the Department of Indian Affairs, and I sense from my discussions with my former colleagues and acquaintances over in that department that their roles have substantially changed. But my own recent experience is that there is still — still room for economic development, and in my interests in dealing with Indian people in the last few years, and indeed my motivation for leaving the Department of Indian Affairs, was because I was personally more enthusiastic about working in an economic development area than I was in social and other areas of which Indian Affairs at the time concerned itself. I don't know whether I've given you a very good answer."

Superimposed upon this social and economic inequality is a growing impatience on the part of the Indians for a new arrangement with the non-Indian community whose members have ample problems of their own. It is apparent the differences between the Indians and the other community are as great, or perhaps greater, than they ever were. Neither community has formulated reasonable expectations of the other. The situation cries out for realism on all sides.

## PART 13

# THE AUTHORITIES, AND SOME COMMENTS

### 1. Introduction

The plaintiffs' claims are set out in their Statement of Claim. In addition to its primary defences that there never were any aboriginal interests in British Columbia or that they have been extinguished, the province pleads a number of constitutional and legal defences.

The province argues that, apart from extinguishment which I shall reach eventually, there cannot be valid aboriginal claims in British Columbia. The province says, further, even if there ever were such rights, they have been settled by the allocation of reserves I have already described in which Canada represented the Indians. Also, the province says that the plaintiffs, by accepting and using reserves and subsidies in lieu of a treaty, have released all aboriginal rights. The province also pleads and relies upon conventional defences such as limitation of actions, both for the land and damages claims, and the **Crown Proceeding Act,** R.S.B.C. 1979, c. 86. It was also argued that many aboriginal territories have been abandoned.

I propose to set aside for later attention all these conventional defences and I shall first struggle with the substantial questions of creation and extinguishment of aboriginal interests.

I do not think it is necessary to cite the various constitutional provisions, but the constitutional scheme is clearly that each of Canada and the provinces may legislate only with respect to the classes of subjects assigned to them by s. 91 and 92 of the **Constitution Act;** Canada has the charge of Indians and lands reserved for Indians; the fee in all ungranted, non-reserve lands belongs to the Crown in right of the province, subject to trusts and other interests existing at the date of Union in 1871; and aboriginal rights existing as of April 1, 1983 are recognized and confirmed by Sec. 35 of the **Constitution Act, 1982.**

Subject to what I shall later say about these lesser defences, I propose to continue my analysis on the basis that arrangements made between Canada and the province, such as P.C. 751 and P.C. 1265, do not directly affect whatever aboriginal claims the plaintiffs may have. Also, I do not propose, for now, to consider the conduct of the plaintiffs either in participating in or using reserve allocations or other benefits as legal releases or waivers of rights.

In other words, I propose to consider aboriginal interests in the historical setting I have described, after which I shall return to consider the other defences.

## 2. The Authorities

Learned counsel for the plaintiffs furnished 23 volumes of authorities and treatises; counsel for the province supplemented the plaintiffs' collection with 8 additional volumes of cases and statutes; counsel for Canada relied upon the foregoing, but added several additional authorities.

I do not propose to refer to very many cases. This is because, although this is a unique case, it is not one of first impression in so far as many of its issues are concerned. In fact, the law relating to many of these issues has carefully been considered in a number of judgments of the highest authority from which the governing principles may be extracted. These cases, and the decisions I shall make in conformance with these principles will lead me inevitably to some difficult new questions which have not previously been considered.

In fact, it is seldom that a case as important as this one has been preceded by such a remarkably similar case. I refer, of course to **Calder,** where some of the very same questions were actually considered by a number of learned judges at all three levels of the judicial hierarchy.

In that case Davey C.J.B.C. at (1970) W.W.R. 481 commented upon this question of authorities at p. 485 as follows.

> "I am aware that the Supreme Court of the United States has not so restricted the application of the Proclamation and has applied it in some degree to Western Indians. Moreover, that the Court has developed from the course of dealing with Indians and Indians lands in the eastern part of North America from the Proclamation and from the liberal political philosophy of the Revolution a body of law dealing with indian rights that incorporates as a matter of principle the practice that the Crown had followed as a matter of policy on the eastern part of the continent. In addition to the comment made by Lord Davey in **Nireaha Tamaki v. Baker,** [at p. 579] about the American cases, in my opinion the decisions of the Privy Council, by which we are bound until the Supreme Court of Canada speaks, have diverged from the principles laid down and applied by the Supreme Court of the United States to Western Indians. For these reasons the judgments of the Supreme Court of the United States have to be applied with caution to the claims of the British Columbia Indians to aboriginal rights in their ancient lands.

I too am dubious about the usefulness of American authorities because they arose in an historical context so different from this province. The early American cases were largely decided in the practical context of defensive treaties with warlike peoples on the frontier, and the **Royal Proclamation** figures in some of the important ones.

American authorities are also concerned largely with treaties which are absent here. Furthermore, and most importantly, some of the great decisions of Chief Justice Marshall's Court, upon which the plaintiffs rely so heavily, treated the Indian peoples with whom they were concerned as "diminished sovereign nations" or "domestic dependent nations." Whether that categorization was adopted in order to give jurisdiction to the United States Supreme Court or otherwise, is of no particular importance. The fact is that the law never granted aboriginals that status in this country or province.

The authority of American cases is also weakened by statutory provisions such as the **Act to Regulate Trade and Intercourse with the Indians, 1790,** and the statutory substitution of compensation for land claims. In a case such as this I am reluctant to rely upon American cases except to the extent they have been adopted by binding authority in this country.

More importantly, however, is the fact already mentioned that these question have already been litigated and in some cases actually decided in this country, and it is largely unnecessary to refer to cases from other jurisdictions. I believe I should attempt to confine myself as much as possible to relevant Canadian authorities.

I recognize that many Canadian cases, including decisions of the Supreme Court of Canada, have often referred to decisions from other countries. I regard those cases unhelpful to the extent they rely upon treaties, statutes, proclamations or recognization of Indian peoples as sovereign or semi-sovereign nations. I shall, of course, extract from them what I think is relevant or persuasive, but I consider myself bound only by the ratio of binding authorities or dicta of the Supreme Court of Canada or the Privy Council in Canadian appeals.

I turn to a consideration of the leading cases from which I believe it is possible to extract the principles which govern this case.

**1. R. v. St. Catherine's Milling and Lumber Company** (1885) 10 O.R. 196; aff'd. 13 Ont. App. R. 148; aff'd (1886) 13 S.C.R. 577: Aff'd (1888) 14 H. L. 47, (J.C.P.C.).

In 1873 the Salteaux tribe of Ojibbway Indians released and surrendered to Canada all their rights to upwards of 50,000 sq. miles of country of which approximately 32,000 sq. miles were in Ontario. This surrender was subject to the right of the Indians to hunt and fish throughout the surrendered territory except those portions taken up for settlement, mining, lumbering or other purposes.

Acting upon the assumption that the beneficial interest in these lands had passed to Canada, it granted a licence to the St. Catherines company to cut and carry away one million feet of timber from a specified part of such territory. When the company sought to do this it was sued by Ontario for an injunction and damages.

The case to a large extent turns upon the terms of the **Royal Proclamation, 1763,** and ss. 91 (24), 109 and 117 of the **British North America Act, 1867,** which provide:

> "91. It shall be lawful [for Canada] to make laws . . . [within classes of subjects], that is to say; . . .
>
> (24) Indians and lands reserved for the Indians . . .
>
> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same . . .
>
> 117. The several Provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

Ontario was successful throughout.

The appeal to the Supreme Court of Canada was heard by 6 judges who divided 4 to 2 in favour of Ontario, with Strong and Gwynne JJ. dissenting. It is only necessary to consider the conflicting judgments of Strong J. (dissenting) and Taschereau J., who sided with the majority in the Supreme Court of Canada before I refer to the opinion of the Privy Council.

Strong J. who reached the same dissenting conclusion as Gwynne J. referred extensively to United States authorities and concluded at p. 612:

> "It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the **dominium utile** is recognized as belonging to or reserved for the Indians, though the **dominium directum** is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States Courts to have been originally enforced by the Crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States Courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the Courts were found to enforce as such, and consequently, that the 24th subsection of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments . . .
>
> To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the Crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations . . . ,"

At p. 623 Strong J. turned to the **Royal Proclamation, 1763,** which he relied upon as furnishing an even stronger argument in favour of the company's grant from Canada. He regarded the Proclamation as a "legislative act" assuring to the Indians the right and title to possess and enjoy these lands until they thought fit of their own free will to cede or surrender them to the Crown. He said the Proclamation operated at the time of confederation as an express legislative appropriation of the land for the use and benefit of the Indians by the designation of "lands reserved to the Indians," in the Proclamation which brought them within s. 91 (24).

Taschereau J., who gave one of the majority judgments, clearly disagreed with the views of Strong J., believing the United States' practice of treating with the Indians arose because the settlers or the King himself "... deemed it cheaper or wiser to buy their rights than fight them, but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees."

At p. 647 Taschereau J. said:

> "Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that Proclamation that gives to the Indians forever the right in law to the possession of any lands as against the Crown. Their occupancy under that document has been one by sufferance only. Their possession has been, in law, the possession of the Crown. At any time before confederation the Crown could have granted these lands, or any of them, by letters patent, and the grant would have transferred to the grantee the **plenum et utile dominium,** with the right to maintain trespass, without entry, against the Indians. A grant of land by the Crown is tantamount to conveyance with livery of seisin. This Proclamation of 1763 has not, consequently, in my opinion, created a legal Indian title ...
>
> It was further argued for the appellants that the principles which have always guided the Crown since the cession in its dealing with the Indians amount to a recognition of their title to a beneficiary interest in the soil. There is, in my opinion, no foundation for this contention. For obvious political reasons, and motives of humanity and benevolence, it has, no doubt, been the general policy of the Crown, as it had been at the times of the French authorities, to respect the claims of the Indians. But this, though it unquestionably gives them a title to the favourable consideration of the Government, does not give them any title in law, any title that a Court of justice can recognize as against the Crown. If the numerous quotations on the subject furnished to us by appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognizing a legal Indian title as against the Crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.
>
> The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control." (pp. 647-9)

As a result, Taschereau, J. and the other majority judges concluded that these were Crown lands at the time of Confederation and belonged to Ontario under s. 109 and 117 of the **British North America Act, 1867.**

It is significant that the views of Strong J., which largely parallel the arguments of the plaintiff in this case, and the contrary views of Taschereau J., were so clearly before the Judicial Committee in the appeal which followed.

In the Privy Council the judgment was given by Lord Watson. At p. 52 he said the case related exclusively to the right of Canada to dispose of the timber, but added that it necessarily involved the determination of the larger question between the governments with respect to the legal consequences of the Treaty of 1873. After reciting several portions of the Royal Proclamation, Lord Watson said the territory in dispute had been in Indian occupation from 1763. I assume this means the Indians had been there before 1763. In any event, it is obvious Lord Watson chose to relate the Indian interest in the lands only to the Proclamation. At p. 54 he said:

> "Their [Indian] possession such as it was, can only be ascribed to the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown."

As was later pointed out in **Calder,** this does not mean the Proclamation was the only source of title, only that Lord Watson chose to rely upon it exclusively.

In a passage most often cited, Lord Watson at p. 55 said that under the terms of the Proclamation:

> "... [the] tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a **plenum dominium** whenever that title was surrendered or otherwise extinguished."

His Lordship then turned to s. 109 which he said was:

> "... sufficient to give to each province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown." (p. 57)

It was pointed out that if the Indians had the fee at the time of the treaty, which came after Confederation, Ontario could have obtained no benefit. It was, however, judicially determined that:

> "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest (the Indians) other than of the Province in the same' within the meaning of s. 109; and must now belong to Ontario ..." (p. 58)

Canada argued in **St. Catherine's Milling** that its exclusive jurisdiction under s. 91(24), that is, "Indians, and lands reserved for the Indians," carried with it any "patrimonial interest" of the Crown in these lands. Their Lordships held against this on the basis of the statutory language which, despite legislative control, did not deprive the province of its beneficial interest in these lands when they became disencumbered of the Indian title.

As a consequence it was held that even though Canada had exclusive power to regulate the Indians' privilege of hunting and fishing, that right did not confer upon Canada the power to alienate, the beneficial interest in the timber having passed to Ontario at Confederation subject to the "Interest" of the Indians which had been released.

***Comment***

The **St. Catherine's Milling** case is of fundamental importance. It is one of the few Canadian appellate cases which makes any comment upon the nature of aboriginal rights. The extreme views of Strong and Gwynne JJ. were fully argued by counsel for Canada but not accepted in the Privy Council. Instead Lord Watson expressed himself in terms far closer to the views of Taschereau J., particularly the passage on p. 54 that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."

Although Lord Watson expressly stated that it was not necessary to express any opinion upon the precise quality of "the Indian right," the description of being a "burden" on the Crown's title is hardly descriptive of a proprietary interest in the Indians. Standing alone, **St. Catherine's Milling** is authority against aboriginal ownership and jurisdiction and it establishes that aboriginal rights exist "at the pleasure of the Crown." Those are judicial pronouncements of fundamental importance.

Lord Watson's language has been commented upon in some subsequent cases. In **Calder,** Judson J. said it did not help to refer to Indian rights as "personal or usufructuary." Instead, he referred to the right of Indians to occupy or live on their lands as their forefathers had done which, translated to this case, relates at least to village sites and surrounding areas, and a right of possession or occupancy for use of a larger area. Judson J. added, however, "There can be no question that this right was "dependent on the goodwill of the Sovereign" which is the same expression used by Lord Watson.

Lord Watson's language has often been approved by the Privy Council as in **Attorney-General for Quebec v. Attorney-General for Canada,** [1921] 1 A.C. 401 and it was expressly approved by the Supreme Court of Canada as recently as **Smith v. the Queen,** [1983] 1 S.C.R. 554, and by Wilson J. in **Guerin,** at p. 349. In the latter case Dickson J., in obiter at p. 379, suggests there may be a distinction where, as in **Guerin,** there was no constitutional issue, but even then he quoted Chief Justice Marshall in **Johnson v. M'Intosh,** at p. 588, that: "All our institutions recognize the absolute title of the Crown subject to the Indian right of occupancy" which that learned judge later found were subject to extinguishment.

While **St. Catherine's Milling** was a case of rights arising under the Royal Proclamation, I have no doubt that the plaintiffs' aboriginal rights, if any, could not be any greater than they would have been under the Proclamation. I do not believe it was suggested otherwise in argument. The principles this case states are too well established for me to challenge or question at this late date.

I can only conclude on the existing authorities, that **St. Catherine's Milling** is powerful authority, binding on me, that aboriginal rights, arising by operation of law, are non-proprietary rights of occupation for residence and aboriginal user which are extinguishable at the pleasure of the Sovereign.

### 2. Calder v. Attorney General of British Columbia [1973] S.C.R. 313

The plaintiffs were members and officers of the Nishga Nation or its Tribal Council. They sued for a declaration:

> "That the aboriginal title, otherwise known as the Indian Title, of the Plaintiffs to their ancient tribal territory, hereinbefore described, has never been lawfully extinguished."

Although some evidence was called, the case was largely tried on admissions. For the purposes of the case the Attorney General admitted that the territory in question, consisting of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and Portland Canal, had been inhabited from time immemorial by the plaintiffs' ancestors where they" . . . hunted, fished and roamed".

The plaintiffs claimed their title arose out of aboriginal occupation and is not dependent upon treaty, executive order or legislative enactment. Alternatively, the plaintiffs argued that if executive or legislative recognition was required, it could be found in the **Royal Proclamation, 1763.**

The Defendant relied entirely upon colonial enactments **(the Calder XIII)** and related documents in support of its defence that aboriginal rights never arose in the province without express Crown recognition, or alternatively, that such rights, if any, had been extinguished by colonial enactments.

The trial judge found aboriginal rights never arose in this province, and further that, if they did, they had been extinguished. The Court of Appeal (Davey C.J.B.C., Tysoe and McLean JJA.) reached the same conclusions.

The agreements and admissions made in **Calder** made it unnecessary for the Court to try all the factual issues that I have struggled with in this case.

In the Supreme Court of Canada, Judson J., with whom Martland and Ritchie JJ. agreed, found that the Royal Proclamation had no bearing upon the question of Indian title in British Columbia. He based this finding upon the language of the Proclamation, the definition of its geographical limits and the history of the province. He specifically found that the ". . .

> Nishga bands . . . were not any of the several nations or tribes of Indians who lived under British protection and were outside the scope of the Proclamation."

After adverting briefly to the history of the colony, Judson J. said at p. 328:

> "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the goodwill of the Sovereign'.

This passage, with which I respectfully agree, satisfies me that the plaintiffs' position at law in British Columbia cannot be greater than it would be if the Royal Proclamation applied in this province except perhaps with respect to village sites.

Judson J. did not find it necessary to deal with the first ground of decision which found favour with the Court of Appeal. Relying upon the agreements of counsel and the admissions of fact, he went right to the question of extinguishment. With regard to the Calder XIII enactments, Judson J. agreed with the conclusion of the trial judge which were quoted (in **Calder**) at p. 325:

> "'The various pieces of legislation referred to above are connected, and in many instances contain references **inter se,** especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.'"

Judson J. also quoted with approval the following passage from the judgment in **U.S. v. Santa Fe Ry. Co.** (1941) 314 U.S. 339 at 347:

> "'Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in **Cramer v. U.S.** (1922), 261 U.S. 219 at 229, 43 S. Ct. 342, 67 L. ed. 626, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."
>
> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. **Buttz v. Northern Pacific Railroad,** 119 U.S. 55, 66 S. Ct. 100, 30 L. ed. 330. As stated by Chief Justice Marshall in **Johnson v. McIntosh** [supra] at p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the Courts. **Beecher v. Wetherby** (1877), 95 U.S. 517 at 525, 24 L. ed. 440 at 441.'"

Judson J. then referred to the Terms of Union between British Columbia and Canada and the legislation passed consequent upon the McKenna-McBride Commission and Report and concluded that in adjusting reserves, including those set aside for Nishga Indians, the federal authority "... did act under its powers under s. 91(24) of the **B.N.A. Act**" and "agreed, on behalf of the Indians, with the policy of establishing these reserves."

He also commented upon the establishment of the Railway Belt which he said was inconsistent with the recognition and continued existence of Indian title. He found the

14 Vancouver Island treaties and Treaty 8 had nothing to do with the question of whether any Indian title was extinguished in the colonial period.

The **ratio** of Judson J.'s judgment is found at p. 344 where he said:

> "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."

It is apparent that Judson J. did not think a express statutory statement of an intention to extinguish was required. Inconsistency in his view was sufficient.

He accordingly would have dismissed the appeal on the ground of extinguishment, but he also agreed with the judgment of Pigeon J., which I shall mention in a moment.

In a long judgment in which Spence and Laskin JJ. concurred, Hall J. reached different conclusions. He briefly touched on the nature of aboriginal rights at p. 352, but found it unnecessary precisely to state their exact nature and extent as he considered the real issue was whether such rights were extinguished by the **Calder XIII** enactments.

Hall J. dealt extensively with the test for extinguishment, suggesting that:

> "... if the right is to be extinguished it must be done by specific legislation in accordance with the law." (p. 353)

and at p. 393 he quoted with approval a pronouncement in **Lipan Apache Tribe vs. U.S.** (1967) 180 Ct. Cl. 487:

> "'While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues."

Hall J. found that the Royal Proclamation, did apply to the benefit of the Nishga Indians in British Columbia. But at p. 401 Hall J. recognized that his finding about the operation of the Royal Proclamation did not assist in answering the question of extinguishment.

In the view of Hall J. the burden of establishing extinguishment falls on the government. He found there was no evidence of a "clear and plain indication" to extinguish the Indian title. At p. 404 he said: "There is no such proof in the case at bar; no legislation to that effect." He then proceeded to discuss the powers of Governors Douglas and Seymour and their councils in which he quoted extensively from some of the historical material I have discussed and concluded at p. 413 that:

> "... if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so, and, therefore, **ultra vires."**

For these and other reasons Hall J. allowed the plaintiffs' action in full.

Pigeon J., however, with whom Judson, Martland and Ritchie JJ. agreed, concluded that the absence of a fiat deprived the trial Court of jurisdiction to adjudicate. As a result, the action was dismissed leaving all question more or less at large but with much useful instruction.

***Comment***

While there are many exceedingly interesting passages in both judgments, the case went off on a technical point which is unfortunate because it dealt with precisely the same issue of extinguishment which arises again in this case.

The case is instructive on another point. Notwithstanding their disagreement on the application of the Royal Proclamation, both judgments assume a right of the Crown to extinguish aboriginal interests which supports the conclusions of the **St. Catherine's** case that aboriginal rights are subject to the pleasure of the Crown.

Because of the importance of **Calder,** I shall discuss it further when I come to consider extinguishment in due course.

**3. The Hamlet of Baker Lake v. Minister of Indian Affairs, and Northern Development** [1980] 1 F.C 518 (F.C.C.).

The plaintiff Inuits, or their representatives, brought this action in the Federal Court of Canada asserting "aboriginal title" over an undefined portion of the Northwest Territories including approximately 78,000 sq. km. surrounding the community of Baker Lake in the District of Keewatin. The plaintiffs claimed relief under several heads additional to aboriginal title, particularly injunctions restraining the Crown from issuing land use permits, and mining companies from mining, and a declaration that the claimed lands are not public or territorial lands.

The defendants were representatives of the Crown in right of Canada and certain mining companies carrying on operations in the area, which operations were alleged by the Inuit to be in breach of their aboriginal rights.

The Inuit obtained an interim injunction restraining the defendants, pending the trial, from exploration or other activities inconsistent with their aboriginal rights.

The Baker Lake area is within what are called the "barren lands" lying north and east of the tree line which meanders from Hudson Bay north of Churchill to the Mackenzie River delta north of Inuvik. The Hamlet of Baker Lake is on the north shore of the lake a few kilometres from the mouth of the Thelon River in about the centre of these Barren Lands. While there are other food resources, survival of the plaintiffs' ancestors depended upon the availability of caribou.

The Baker Lake area was part of Rupert's Land granted to the Hudson's Bay Company in 1670 and was a settled colony, rather than a conquered or ceded colony, and was admitted into Canada in 1870. Inuit persons were observed in the area as early as 1762 but there was no white settlement at Baker Lake until the Company established itself there in 1914.

While the plaintiffs' ancestors lived a nomadic existence off the land for a long, long time, starvation became so serious in the 1950's that the Inuit were actively encouraged by the government to settle in the Hamlet which, at the time of trial, was a fairly modern community of about 1,000 Inuit, an increase from 150-200 in 1960. It was found, however, that notwithstanding this resettlement, the Inuit continued to range far and wide over their traditional pre-settlement territory hunting caribou as they always had but now by snowmobile.

Mahoney J., (as he then was), found the **Royal Proclamation, 1763,** never applied to the barrens. He concluded, however, on the authority of **Calder,** that aboriginal rights arise as well at common law. He then held that the elements which must be proven to establish "an aboriginal title cognizable at common law" are:

> "1. That they and their ancestors were members of an organized society.
>
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
>
> 3. That the occupation was to the exclusion of other organized societies.
>
> 4. That the occupation was an established fact at the time sovereignty was asserted by England."

Relying upon a number of authorities, Mahoney J. held that the required level of social organization depends upon the needs of its members, and that the Inuit society, while primitive, did not change significantly from well before 1610 when Henry Hudson claimed sovereignty for Britain. He held that their primitive social organization was sufficient in the circumstances.

There was no real dispute about most of the territory which the Inuit had always roamed over without competition from other societies, except in the south-west which Mahoney J. concluded was not Inuit territory.

As a result, Mahoney J. had no difficulty concluding that the plaintiffs had a common law "aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it."

He then turned to the question of extinguishment. It was argued that the plaintiffs' aboriginal "title" was extinguished by the Royal Charter of 1670 granting the barren lands to the Company. This argument was rejected on the ground that the Company's ownership was notional, analogous to that of the Crown, and that there was no inconsistency between an aboriginal right superimposed upon the radical title of the Crown.

Mahoney J. also rejected the further argument that the plaintiffs' right had been extinguished since the admission of Rupert's Land into Canada by land legislation said to be inconsistent with aboriginal rights. He concluded that the clear and plain intention of the Crown to extinguish aboriginal rights had not been shown, particularly as the said right was found not to be proprietary or equivalent to surface rights. At p. 576 he held:

> "With the exception of a number of parcels in the hamlet itself, I am entirely satisfied that the entire territory in issue remains "territorial lands' within the meaning of the **Territorial Lands Act** and 'public lands' within the meaning of the **Public Lands Grants Act.** They are subject to the **Canada Mining Regulations.** To the extent that their aboriginal rights are diminished by those laws, the Inuit may or may not be entitled to compensation. That is not sought in this action. There can, however, be no doubt as to the effect of competent legislation and that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails."

In the final result, the Inuit were granted a declaration that the specified lands were "... subject to the aboriginal right and title of the Inuit to hunt and fish thereon," but their other claims were dismissed and the injunction granted to the Indians against the mining companies was dissolved.

***Comment***

It is difficult to imagine a clearer case for aboriginal rights than **Baker Lake** because the plaintiffs' ancestors had exclusively used these lands for aboriginal purposes for a long, long time before contact or sovereignty.

While the plaintiffs did not claim ownership or sovereignty, they made claims at least equivalent to ownership which were all dismissed. The mining companies were permitted to continue their operations on the same lands under legislative authority. That clearly diminished the exclusivity of the aboriginal interests of the Inuit. This suggests a reconciliation which also appears in subsequent cases.

The case is significant because it suggests there is room for both aboriginal rights and settlement or development.

**4. Guerin v. the Queen,** [1984] 2 S.C.R. 335.

The Musqueam Band, on the advice of the Department of Indian Affairs, surrendered 162 valuable acres in their reserve to the Crown "... forever in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people."

This surrender followed a series of meetings at which the proposed terms of lease were discussed with the band members, but the trial judge found the terms of the lease ultimately entered into bore little resemblance to what was discussed and approved by the Band at the surrender meeting. He also found the Indians would not have surrendered their land on the basis contained in the lease. He found liability against the Crown and assessed damages at $10 million.

Wilson J., speaking for herself, Ritchie and McIntyre JJ., said the Crown did not hold the land in trust for the bands. Although the Indians had no fee in the lands their limited interest gave rise to a fiduciary obligation of which s. 18 of the Indian Act is a statutory acknowledgement. She then concluded that there had been a breach of that fiduciary duty. Her judgment is based entirely on that concept. The only reference she makes to the nature of Indian rights generally is at p. 349 where she said:

> "While I am in agreement that s. 18 does not **per se** create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in **Calder v. Attorney General of British Columbia,** [1973] S.C.R. 313. In that case the Court did not find it necessary to define the precise nature of Indian title because the issue was whether or not it had been extinguished. However, in **St. Catherine's Milling and Lumber Co. v. The Queen** (1888), 14 App. Cas. 46, Lord Watson, speaking for the Privy Council, had stated at p. 54 that 'the tenure of the Indians ... [is] a personal and usufructuary right'. That description of the Indian's interest in reserve lands was approved by this Court most recently in **Smith v. The Queen,** [1983] 1 S.C.R. 554."

Dickson J., as he then was, speaking for himself and three other judges, noted that a surrender may be absolute or qualified, conditional or unconditional, and he found a breach of an equitable obligation or fiduciary duty. In his judgment, however, he explored "the basis of aboriginal title and the nature of the interest in land which it represents."

He then briefly reviewed a number of Canadian, American and Commonwealth decisions and concluded at p. 378 that a change in sovereignty over a particular territory does not in general affect the "presumptive title" of the inhabitants, and that:

> "That principle supports the assumption implicit in **Calder** that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it . . .
>
> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with recognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see **Attorney-General for Quebec v. Attorney-General for Canada,** [1921] 1 A.C. 401, at pp. 410-11 (the **Star Chrome** case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation." (pp. 378-9)

As can be seen from the above, the authority relied upon is the **Star Chrome** case, where the Privy Council fell into the error of thinking the lands in question were subject to the Royal Proclamation, when they were not. In any event, a conditional surrender of interests in either class of lands would impose the same quality of obligation or duty upon the Crown.

Dickson J. then went on to express a number of views about the nature of Indian title, suggesting the **St. Catherines** terminology is not useful although it had been accepted in the unanimous decision in **Smith** in the previous year. His last paragraph on page 382 causes me some difficulty. He said:

> "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the **sui generis** interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealing with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."

As **Guerin** was a case about a breach of duty in the negotiations for a lease of a portion of an established reserve, the "certain lands" quoted in the above passage probably refers to reserve lands, particularly when the cases cited, except **Calder,** were cases about reserves. This view gains some strength from the reference to the "Crown's original purpose in declaring the Indians' interest to be inalienable," because apart from the Royal

Proclamation, which I have found inapplicable in British Columbia, the Crown has made no "declaration" of inalienability except with respect to reserves.

I also have some difficulty with the suggestion that, upon the surrender of "a pure aboriginal right", the Crown would nevertheless be required to deal with it for the benefit of the Indians. I can only conclude that Dickson J. was saying that the principles dealing with breaches of duties owed to aboriginals would be the same whether the lands in question were reserve lands or other lands charged with unextinguished aboriginal rights.

Dickson J. then went on to agree that the Crown's obligation to the Indians was not a trust but rather a fiduciary duty which was breached by entering into a lease upon less favourable terms than were approved by the Indians.

Estey J., the eighth judge (as Laskin C.J.C. took no part in the judgment), declined to "resort" to what he called the "... technical and far-reaching doctrines of the law of trusts and to concomitant law attaching to the fiduciary." He decided the case favourably to the Indians on the law of agency.

### *Comment*

**Guerin** is not a case about common law aboriginal interests, but rather about a breach of a fiduciary duty relating to reserve lands and it is not a case about extinguishment. It clearly supports the view that aboriginal interests arise at law and do not depend upon statutory enactment or Executive recognition. The province was not a party.

### 5. R. v. Sioui (1990), 70 D.L.R. (4th) 427 (S.C.C.)

Indians of the Lorette Indian Reserve were convicted of the offenses of cutting down trees, camping and making fires in places not designated for such purposes in Parc de la Jacques-Cartier contrary to ss. 9 and 37 of the **Regulation respecting the Parc de la Jacques-Cartier,** which had been adopted pursuant to the **Quebec Parks Act.** They admitted committing the acts of which they were charged in the park outside the boundaries of their reserve, but defended on the ground that they were practising certain ancestral customs and religious rites which are the subject of a treaty dated September 5, 1760 between the Hurons and the British. The treaty is in these terms:

> "THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNIC MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: — recommending it to the Officers commanding the Posts, to treat them kindly.
>
> Given under my hand at Longueil, this 5th day of September, 1760.
>
> By the Genl's Command, JOHN COSNAN, Adjut. Genl.
>
> JA. MURRAY."

At that date in 1760, 3 days before the surrender of Montreal, the Hurons were settled at Lorette and made regular use of the territory which is now the said park. The Court of Appeal found that the 1760 document was a treaty, and that the customary activities or religious rites practised by the Hurons in the park were protected by the treaty. Section 88 of the **Indian Act** was found to make the accused immune from this prosecution. Section 88 provides:

> "88. **Subject to the terms of any treaty** and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act." (my emphasis)

The appeal came to the Supreme Court of Canada for decisions on constitutional questions, namely whether the document is a treaty, whether it was still in force and, if so, whether the said regulations are unenforceable with respect to the accused. The Indians based their whole case upon the treaty and "... have at no time based their argument on the existence of aboriginal rights protecting the activities with which they are charged."

Lamer J. (now C.J.C.) gave the judgment of the Court.

After an extensive historical analysis, and applying liberal principles of construction, Lamer J. determined that the 1760 document was indeed a treaty which "must in turn be given a just, broad and liberal construction." He also concluded that the treaty had not been extinguished.

The importance of the case, for the purposes of this case, is the part dealing with the interaction of treaty protection with provincial regulations.

The Indians argued that they were entitled to carry on their customs and religion in the park because it is part of a larger territory frequented by the Hurons in 1760, while the Crown alleged the operation of the treaty was limited to the definable Lorette territory which is mentioned in the treaty. In any event, the Crown argued, these rights should be limited in accordance with the legislation designed to protect the park and its users.

Counsel for Canada, an intervenor, argued that the Indians' claim was really a territorial one and that they would have to establish a connection between the rights claimed and their exercise of these rights in a given territory. At p. 49 Lamer J. said:

> "... the problems raised by the territorial question should be briefly stated. There are two rights in opposition here: the provincial Crown's right of ownership over the territory of the park and the Hurons' right to exercise their religion and ancestral customs on this land. The ownership right suggests that ordinarily the Crown can do whatever it likes with its land. On the other hand, a very special importance seems to attach to territories traditionally frequented by the Hurons so that their traditional religious rites and ancestral customs will have their full meaning. Further, the Hurons are trying to protect the possibility of carrying on these rites and customs near Lorette on territory which they feel is suited to such purposes."

Lamer J. disagreed with the majority of the Court of Appeal that the only territorial limitation should be the area the Hurons frequented in 1760 because that might include a vast territory and it would permit trees to be cut and fires to be started on private property. He said:

> "... Even a generous interpretation of the document ... must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible

> interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.
>
> The interpretation which I think is called for when we give the historical context its full meaning is that Murray and the Hurons contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory."

Lamer J. then undertook an analysis of the competing interests of the Indians and the British in 1760. He mentions that the British were not likely to have intended to grant rights which might paralyse the Crown's use of its newly conquered territories, and he assumed the parties:

> ". . . intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests . . . This gave the English the necessary flexibility to be able to respond in due course to the increasing need to use Canada's resources . . . The Hurons, for their part, were protecting their customs wherever their exercise would not be prejudicial to the use to which the territory concerned would be put. The Hurons could not reasonably expect that the use would forever remain what it was in 1760 . . . The Hurons were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier . . . I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs."

In conclusion, therefore, Lamer J. found that the park was occupied by the Crown since its establishment by legislation, but he thought the important question was whether the Crown's type of occupancy was incompatible with the exercise of the Indians' customs. He found that some limitation of the exercise of rights protected by the treaty must be assumed since 1760, but although the Crown called evidence on the question he was not persuaded that the exercise of the rites and customs was incompatible with the Crown's rights.

The appeal was accordingly dismissed.

### *Comment*

This case is about a treaty, not about aboriginal rights, but it suggests an approach not different from what was employed in **Baker Lake.** This approach seeks to reconcile conflicting rights so that they may operate together sometimes by limiting one or both rights reasonably. This approach is also seen in a different context in **Sparrow,** which follows next.

### 6. **R. v. Sparrow,** [1990] 4 W.W.R. 410 (S.C.C.)

Mr. Sparrow, a Musqueam Indian, was charged under the **Fisheries Act** R.S.C. 1970, c. F-14 for fishing with a drift net longer than permitted by the terms of his Band's food fishing licence. He admitted the facts alleged to constitute the offence but defended on the ground he was exercising an existing aboriginal right to fish and that the net length restriction was invalid because it was inconsistent with **s. 35(1)** of the Constitution.

This impugned fishing took place in Canoe Pass within the area of the Musqueam band's food licence and within an area of the Fraser River where the Musqueam and other bands of Indians have fished from time immemorial. The licence restricted drift nets to 25 fathoms in length. Mr Sparrow was using a 45 fathom net.

Mr. Sparrow was convicted at trial. The Court of Appeal found Mr. Sparrow was fishing in the ancient tribal territory where his ancestors had always fished, but concluded that Parliament retained the power to regulate fishing and to control Indian lands under ss. 91(12) and (24) of the **Constitution Act, 1867.** The Court concluded however, that the facts found at trial were not sufficient to support a defence based upon the **Constitution** and dismissed the appeal.

Both Mr. Sparrow and the Crown appealed to the Supreme Court of Canada and a constitutional question was stated:

> "Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the **British Columbia Fishery (General) Regulations** and the **Fisheries Act,** R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the **Constitution Act, 1982?"**

Generally speaking, the **Fisheries Act** gives the Governor in Council power to make regulations for the proper management of the coastal and inland fisheries, conservation, commercial and Indian food fishing, gear and equipment, and licensing.

Under these powers the Governor in Council enacted the Regulations mentioned in the question, under which the Musqueam Band was on March 31st issued an Indian food fishing licence, as it had each year since 1978, "to fish for salmon for food for themselves and their family" in the specified areas where the alleged offence occurred. The licence contained time restrictions as well as the type of gear to be used, notably, "One drift net twenty-five (25) fathoms in length."

The judgment of the Court was delivered by Dickson C.J.C. and LaForest J. with whom all the other member of the Court concurred. The judgment includes a discussion of the operation of s. 35 (1) of the **Constitution Act, 1982** which provides:

> **"Rights of the Aboriginal Peoples of Canada"**
>
> **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed . . ."

The Court first considered the word "existing" and concluded that such rights are those that were in existence when the **Constitution Act,** 1982 came into force, and this must be interpreted flexibly ". . . so as to permit their evolution over time." "Existing rights," the Court held, are "affirmed in a contemporary form rather than in their primeval simplicity and vigour." The Court rejected the concept of "frozen" rights which, for example, might have limited present-day Indians to fishing by aboriginal methods, and without modern gear.

The Court then turned to the aboriginal right in question, and accepted the correctness of the Court of Appeal's finding that:

> "... Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River."

The Court noted the gradual increased stringency of the Indian right to fish starting in 1878 until 1977 when, except for those holding a commercial licence, as many did, they could only fish for food under a special licence. This stringent regulation, the Crown argued, constituted extinguishment. The Court rejected that argument, suggesting it confused regulation with extinguishment. The Court added:

> "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

The Crown, having only relied upon past regulation as evidence of extinguishment, was found to have failed to discharge its burden of proving extinguishment.

The scope of the existing Musqueam aboriginal right to fish, however, was limited to the right to fish for food, or for ceremonial and social occasions, their case at trial not having been presented on an evolving aboriginal right to fish for commercial or livelihood purposes. The ingredients of the plaintiffs' aboriginal rights were not further discussed.

For example, there is no discussion of the important question of exclusivity mentioned in **Baker Lake,** even though there was evidence mentioned by the Court that upwards of 20,000 Indians (compared with only 640 Musqueam), comprising 91 other tribes, obtain their food fish from the Fraser River, "... some or all of [whom] may have an aboriginal right to fish there." I conclude, therefore, that the Court did not intend its comments in this case to represent a final, comprehensive pronouncement on the ingredients of aboriginal rights. This must, of course, be so as the Court was only dealing with the regulation of tidal fishing which is relatively easy to regulate compared with multiple land use which I have to consider in this case.

The Court expressly limited its judgment when it adopted the Court of Appeal's characterization of the right "for the purpose of this case," and said it would confine its reasons to the meaning of s. 35 recognition and affirmation of an existing right "to fish for food and social and ceremonial purposes," and the impact of s. 35 on the regulatory power of Parliament.

The Indians' position on s. 35 was simply that almost any regulation of their participation in the fishery would be "inconsistent" with their right, and a contravention of s. 52(1) of the Constitution. They argued their right should be subject only to exceptional circumstances (the onus of which would be on the Crown) to preserve the aboriginal right for future generations whenever restricting fishing by others would not suffice, and when the aboriginal users were unwilling to implement necessary conservation measures.

Without expressly saying so, the Court rejected this extreme view, but concluded that, "... over the years the rights of Indians were often honoured in the breach". In addition, the Court contrasted the differing federal policies stated in 1969 and 1973, the latter being described as an "expression of acknowledged responsibility," which included the federal government's willingness to negotiate regarding claims of "aboriginal title," specifically in British Columbia, Northern Quebec and the Territories without regard to formal supporting documents. The Court quoted the federal government's 1973 statement, saying it:

> "... is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the

> lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

I suppose the federal government stated its position as it did, implying a surrender of aboriginal rights in exchange for "compensation or benefit" because the federal government has no jurisdiction in matters such as land assigned exclusively by the Constitution to the provinces and the federal authority could not offer more than compensation.

Returning to **Sparrow,** the Court, after referring to the **Nowegijick** principle, quoted with approval the language of MacKinnon A.C.J.O. in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360 (Ont. C.A.), quoted by Blair J.A. in **R. v. Agawa,** (1988), 28 O.A.C. 201 at 215-16, as follows:

> "The second principle was enunciated by the late Associate Chief Justice MacKinnon in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian right "in a vacuum." The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:
>
> > "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see **Guerin v. the Queen,** [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.'" (pp. 23-4)

The Court (in **Sparrow**) said the general guiding principle for s. 35(1), is that:

> ". . . the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

But, the Court also said that every law or regulation that affects an aboriginal right is not automatically of no force or effect. Rather, "Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a [recognized] right . . ."

The Court said, "Rights that are recognized and affirmed are not absolute. Federal legislative powers continue . . ." but they must now be read together with s. 35(1). The Court also said:

> "In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in **Nowegijick,** supra, and the concept of

> holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by **Guerin** . . .
>
> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35 (1)." (pp. 25-26)

In furnishing an analysis of the s. 35(1) process for food fishing regulation, the Court suggested two stages, first to determine if there is interference, and secondly whether such interference can be justified by reference to the legislative purpose of the law or regulation, such as conservation. If the purpose is permissible it is necessary to go to the second stage of the justification question which relates to the honour of the Crown which ". . . must be the first consideration in determining whether the legislation or action in question can be justified." On this basis the Court held that first priority, after proper conservation measures have been taken, must be in satisfaction of aboriginal food requirements.

The Court then added further factors to this justification inquiry, as follows:

> ". . . whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries."

Finally, the Court turned to the question of the net length in this case and concluded there was not sufficient evidence to permit a s. 35(1) analysis, so a new trial was ordered at which Mr. Sparrow would have the onus of proving the net restriction was a **prima facie** infringement of a collective aboriginal right to fish for food, and if so, the Crown would have to demonstrate the regulation is justifiable.

### *Comment*

**Sparrow** is obviously a very important case which was delivered during argument in this case. This gave counsel limited time to prepare their submissions although they all rose to the occasion and each claimed to find it helpful. As the most recent pronouncement of our highest Court on aboriginal rights, albeit fishing rights under federal jurisdiction and regulation, and on the impact of s. 35(1), **Sparrow** is really about the permissible limits of government regulation. It builds on the "honour of the Crown" contained in **Guerin** and introduces the important question of priority.

Clearly **Sparrow** adds dimensions to the concept of aboriginal rights but it follows the trend started in **Baker Lake** and **Sioui** that limits conflicting rights reasonably by a reconciling process. The full implications of **Sparrow** cannot be understood until it has been tested in a number of different factual contexts. It adds substantially to the jurisprudence, settles the test for extinguishment, and provides much useful guidance.

What is lacking in **Sparrow,** because it was not necessary for the decision, is any discussion about the interaction of competing historic principles such as the right of the Crown to extinguish aboriginal rights "at its pleasure" and aboriginal user rights of land.

### 3. Summary of Authorities

I apologize to counsel for dealing so briefly with the many authorities to which they referred in their excellent arguments. However, I do not find it necessary to analyze more than those I have just discussed and those already or later mentioned in this judgment.

Amongst the wisest dicta ever delivered was that of the judge (unknown to me) who said every case depends upon its particular facts. With that wisdom in mind, I nevertheless propose to attempt the dangerous task of summarizing the basic law. What follows is not intended to be exhaustive.

The above cases provide authoritative answers to some, but not all of the questions which arise in this case. This case raises subtle issues not discussed in any of them. The authorities deal with the test for extinguishment, but not with the application of that test in specific circumstances. Further, as **Sparrow** was a case within federal jurisdiction (fishing), it mandates a reconciliation process which can be used as a guide to matters within provincial jurisdiction, but its rigid justification process can hardly be applied strictly to land use within such a huge territory or to an entire province.

1. Aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty.

2. Aboriginal interests are communal, consisting of subsistence activities and are not proprietary.

3. Common law aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period. Upon Confederation the province obtained title to all Crown land in the province subject to the "Interests" of the Indians. A central question in this case is whether the plaintiffs' aboriginal rights were extinguished during the colonial period.

4. Unextinguished aboriginal rights are not absolute. Crown action and aboriginal rights may in proper circumstances be reconciled. Generally speaking, aboriginal rights:

(a) may be regulated by the Crown only when

(b) such regulation operates to interfere with aboriginal rights pursuant to:

  (i) legitimate Crown objectives which can honourably be justified; without

  (ii) undue interference with such rights; and

  (iii) with appropriate priority over competing, inconsistent activities.

The foregoing is, of course the briefest possible summary of my understanding of the authorities and it does not include every aspect of aboriginal rights. I shall now attempt to apply them to the facts of this case. Additional concepts must also be considered which arise out of the authorities. If there are conflicts between this summary and what follows then the latter must prevail.

## PART 14

# THE PLAINTIFFS' SPECIFIC CLAIMS FOR ABORIGINAL INTERESTS

The plaintiffs have conveniently classified their claims under three heads, ownership, jurisdiction (sovereignty) and aboriginal rights and I shall deal with them on that basis although, as will be seen, the first two require quite different treatment from the third. In this Part of my judgment I shall make a number of findings for the assistance of the parties and the appeal courts even though some of these findings may turn out to be unnecessary for the final decisions I shall eventually reach in this case.

Claims for aboriginal interests must be unique — **sui generis** — to particular Indians in relation to specific territory in their historical, social, legal, and political context. I repeat what Dickson J. said in **Kruger and Manuel v. The Queen** (1978) 1 S.C.R. 104 (S.C.C.)

> "Claims to aboriginal title are woven with history, legend, politics and moral obligations."

It is the law and the evidence with which these concepts must be woven and I understand the foregoing includes not just Indian history and politics. What has happened both in the territory and in the province before and since the time of contact must also be considered. Two hundred years of history cannot be ignored.

Before I consider these claims I must first deal with an important question of status.

### 1. The Status of the Plaintiffs in this Action

I have attempted to organize this judgment so that I shall deal with the substantive questions of aboriginal interests before I consider the lands which could be subject to such interests. Anticipating the conclusion I have expressed in Part 17 that the plaintiffs have not established their internal boundaries, it will be convenient now to consider the nature of the aboriginal interest to which they would be entitled but for the question of extinguishment.

I have already described the form of this action where some of the hereditary chiefs are advancing these claims for aboriginal interests on behalf of themselves or on behalf of their Houses or members.

The authorities satisfy me that a claim for an aboriginal interest is a communal claim. Counsel for the Nishga in **Calder** (at p. 352) described it as "a tribal interest" and Hall J. (at pp. 401-402) said it was a "communal right." In **Sparrow** there are references to a collective rather than an individual, or sub-group interest. Although **Sparrow** was a prosecution which can only be a personal proceeding, most of these cases are brought on behalf of peoples, bands or tribes: see **Martin v. R. in Right of B.C.** (1986) 3 B.C.L.R. (2nd), 60 B.C.S.C.). The Crown's "promise" of fair dealing must be classified as a communal or collective promise rather than separate or divided promises to a variety of individuals or sub-groups.

While no claim may be defeated by misjoinder or non-joinder of parties, the question is an important one because it bears directly upon the identity of the Indians who may participate in the enjoyment of what, in my view, can only be a communal right. While a claim by a chief for himself could not, and a claim by a Chief for the members of his House could, be viewed as a communal claim, the law cannot conveniently recognize discrete claims by small or sub groups within an aboriginal community.

The plaintiffs' case as pleaded, if established, could result in some Gitksan and Wet'suwet'en persons being treated substantially differently from other members of the larger aboriginal collective. The absence of the Kitwankool people must also be noted in the formal judgment of the Court.

In addition, the exercise of any aboriginal right by an individual or sub-group, including the rights of children not separately represented in this action, could be defeated by arbitrary or artificial socio-political arrangements by which, as the evidence shows, non-members have been able to gain control of Houses with substantial territorial claims through processes which, although permitted by aboriginal custom, would make the performance of the Crown's promise almost impossible.

Notwithstanding the failure of the plaintiffs to prove their internal boundaries, as hereafter explained, there is no reason why the named plaintiffs should not represent the Gitksan and Wet'suwet'en people on whose behalf this action has been brought. But any judgment to which they are entitled must be for the benefit of these peoples generally, and not piecemeal for the Hereditary Chiefs, their Houses, or their members. It will be for the parties to consider whether any amendment is required in order to make the pleadings conform with the evidence, the Courts findings, and the law as I understand it. As presently advised, I would consider it sufficient to make the named plaintiffs' representation "clear and plain" by recitals in the formal judgment of the Court. I shall leave that question to counsel.

There is no reason, of course, why an aboriginal people cannot agree among themselves to allocate the exercise of aboriginal benefits or practices in any way they wish. That must be a matter of consent which may or may not be enforceable in the Court depending upon how it is done and how other interests are protected. Such agreements would not, of course, bind either the Crown or anyone not a party to such an arrangement.

## 2. Aboriginal Jurisdiction and Ownership

With respect, it is difficult to find much legal merit in these parts of the plaintiffs' claims because success seems to be foreclosed by powerful pronouncements of high authority. As to aboriginal sovereignty, there is a clear statement by Dickson C.J.C. and LaForest J., speaking for a unanimous Supreme Court of Canada, in **Sparrow,** at p. 1103 that:

> "... there was from the outset never any doubt that **sovereignty and legislative power,** and indeed the underlying title to such lands vested in the Crown."

The text of the above suggests the Court was speaking as of the date of British sovereignty but I shall nevertheless consider the aboriginal position prior to that time.

As to ownership, there is binding legal authority, particularly the **St. Catherine's Milling** case that seems to be directly against the plaintiffs on this issue. In that case the Privy Council at p. 54 made it clear that even under the Royal Proclamation:

> "... the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories:' and it is declared to be the will and pleasure of the sovereign that, "for the present" they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion ..."

This statement, also by its terms relates to the period after British sovereignty, and it makes it clear that aboriginal interests, if any, are not proprietary. As I have stated elsewhere, I do not understand it to be contended that the plaintiffs aboriginal interests could be greater than they would be under the Royal Proclamation.

As mentioned earlier, a number of judges have commented upon and even restated the above language of the Privy Council but they have not suggested that aboriginal interests are proprietary.

I must say, with respect, that in my judgment these authorities are conclusively against the plaintiffs' claims for sovereignty and ownership. As with jurisdiction, I shall consider the nature of the ownership, if any, of the plaintiffs' ancestors prior to British sovereignty.

It will be convenient to deal with these two classes of claims together in the first instance although I shall later discuss them in greater detail separately. In this context I equate jurisdiction to aboriginal sovereignty. In their argument, plaintiffs' counsel tended to refer to it as "jurisdiction."

It is obvious that British sovereignty could not have been earlier than, say, 1803 when criminal jurisdiction was extended over the so called "Indian Territories." There are later, more likely possibilities such as 1805-06 when Simon Fraser established forts to the east of the territory, or 1822, when Fort Kilmaurs was opened on Babine Lake, or 1846 when the **Oregon Boundary Treaty** was completed, or 1858 when the Mainland Colony of British Columbia was established. I have concluded that it does not really make any difference which date is chosen. I shall next explain why I have that view.

### (a) The Relevant Date

The plaintiffs' claims for aboriginal interests must depend upon indefinite, long aboriginal use of specific territory.

I have found some of the ancestors of some of the plaintiffs have used some of the territory in an aboriginal setting for a long, long time. I shall discuss the true nature of this "presence" shortly, but the foregoing satisfies the threshold "time-depth" requirement for aboriginal interests.

Prior to the arrival of European influences in the territory, aboriginal practices were probably confined reasonably close to village sites where salmon could most easily be obtained, and probably included trapping some animals by snares and deadfall traps and other means. There was no reason for them to travel other than between the villages or far from the great rivers for these or other aboriginal purposes, or to take more animals than were needed for subsistence although it is also reasonable to assume they would have travelled as far as was necessary for such purposes. I consider it highly significant that there is no evidence of village sites in the territory north of Gitengasx or south of Moricetown as I would have expected if those areas were populated before contact.

I find that the aboriginal practices of the plaintiffs' ancestors were, first residence, and secondly subsistence — the gathering of the products of the lands and waters of the territory for that purpose and also for ceremonial purposes. These both predated the historic period for a long, long time, and continued into the historic period (with new techniques) up to the time of sovereignty and since that time but with decreasing frequency.

I doubt if the commencement of European influence in the territory was earlier than Cook's landfall in 1778 and it was more probably around or after the turn of the century. There may have been isolated intrusions of trade goods from unknown directions at a slightly earlier period but not in any significant quantity.

I also doubt if commercial trapping started in the territory before the 1805 or 1806 and probably a few years later than that time. Then, with the introduction of metal or mechanical traps and a market for excess furs, I believe some of the ancestors of the plaintiffs found it advantageous to spread out from their villages into distant territories for the purpose of commercial trapping. Apart from this, and the gradual accommodation of Indians to European trade goods and civilization (which did not change the nature of aboriginal activities), I doubt whether anything relevant to this action occurred in the territory between early European influences and the assertion of British sovereignty whenever that may have been.

Thus I find that the plaintiff's ancestors probably lived an aboriginal lifestyle mainly in the vicinity of and during travel between their villages and this continued until sovereignty. Without doubt, however, those lands were also used after contact for commercial trapping.

In my view, commercial trapping was not an aboriginal practice prior to contact with European influences and it did not become an aboriginal practice after that time even if lands habitually used for aboriginal purposes were also used for commercial trapping after contact. No question of abandonment of aboriginal rights would arise so long as those lands were also used for sustenance, as I am sure they were, although with modern techniques. For these reasons, commercial trapping is a neutral fact in the definition of aboriginal lands habitually used by the plaintiffs' ancestors, that is lands near and between villages and great rivers.

With regard to new lands used after contact for commercial trapping, particularly in the far north and south extremities of the territory, it is my view that such would not be an aboriginal use and those new lands would not be aboriginal lands even if they were also used for sustenance after contact. This is because, firstly, commercial trapping is not an aboriginal practice, and secondly because the use of these new lands, even partly for aboriginal purposes under European influences after contact, does not constitute the kind of indefinite long time use which is required for aboriginal rights. In such matters a user period of 20 to 50 years or so is of no importance.

Since the only significant development between first contact with European influences and the date of sovereignty was the commencement and spread of commercial trapping, and as that is a neutral fact for the reasons I have just stated, I do not believe there is any material difference, for the purposes of this case, between the date of contact and the date of sovereignty. In other words, it is only the lands used for a long time for aboriginal purposes at the time of sovereignty that qualify as aboriginal lands. Lands first used for any purpose, such as in the far north and south, after the date of contact, but before British sovereignty would not be aboriginal lands because they had not been used for the requisite long time prior to sovereignty.

### (b) Aboriginal Jurisdiction and Ownership Before British Sovereignty

It is obvious that these two legal concepts were subject to profound change at the time of British sovereignty while aboriginal rights could more easily survive sovereignty. In addition, the principle of extinguishment may operate differently upon aboriginal ownership and jurisdiction on the one hand and aboriginal rights on the other hand. Thus I shall deal with aboriginal jurisdiction and ownership first, and return to aboriginal rights later.

It will be useful to refer to what the plaintiffs have alleged as the basis for their claims to jurisdiction and ownership, and to comment briefly on each of them. These allegations, from par. 57 of the Statement of Claim, are that the plaintiffs and their ancestors have:

"(a) lived within the territory." This is a correct statement as to village sites but presence is only one aspect of aboriginal interests.

"(b) harvested, managed and conserved the resources within the Territory." While there is no doubt the Indians harvested their subsistence requirements from parts of the territory, it is impossible to conclude from the evidence that these three activities, to the extent they were practised, were anything more than common sense subsistence practices, and are entirely compatible with bare occupation for the purposes of subsistence. The evidence does not establish either a policy for management of the territory or concerted communal conservation.

"(c) governed themselves according to their laws." I have no difficulty finding that the Gitksan and Wet'suwet'en people developed tribal customs and practices relating to chiefs, clans and marriage and things like that, but I am not persuaded their ancestors practised universal or even uniform customs relating to land outside the villages. They may well have developed a priority system for their principal fishing sites at village locations.

"(d) governed the Territory according to their laws." I have covered this item in the previous paragraph.

"(e) exercised their spiritual beliefs within the territory." I expect that this is probably so, but the evidence does not establish that these beliefs were necessarily common to all the people or that they were universal practices. I suspect customs were probably more widely followed.

"(f) maintained their institutions and exercised their authority over the Territory through their institutions." The plaintiffs have indeed maintained institutions but I am not persuaded all their present institutions were recognized by their ancestors. The evidence in this connection was quite unsatisfactory because it was stated in such positive, universal terms which did correspond to actual practice. I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.

"(g) protected and maintained the boundaries of the Territory." This is unproven. There seemed to be so many intrusions into the territory by other peoples that I cannot conclude the plaintiffs' ancestors actually maintained their boundaries or even their villages against invaders, although they usually resumed occupation of specific locations for obvious economic reasons. As recently as the 1890's Loring found Indians in defensive, winter locations away from their villages and I am uncertain the plaintiffs' ancestors maintained any boundaries.

"(h) expressed their ownership of the Territory through their regalia, adaawk, kun'gax and songs." I do not find these items sufficiently site specific to assist the plaintiffs to discharge their burden of proof.

"(i) confirmed their ownership of the Territory through their crests and totem poles." There is considerable doubt about the antiquity of crests and totem poles upon which I find it unnecessary to express any opinion.

"(j) asserted their ownership of the Territory by specific claim. This was not pressed in argument and does not assist the resolution of these issues.

"(k) confirmed their ownership of and jurisdiction over the Territory through the Feast system." I do not question the importance of the feast system in the social organization of present-day Gitksan and I have no doubt it evolved from earlier practices but I have considerable doubt about how important a role it had in the management and allocation of lands, particularly after the start of the fur trade. I think not much, for reasons which I have discussed in other parts of this judgement. Perhaps it will be sufficient to say that the evidence about feasting is at least equivocal about its role in the use or control of land outside the villages.

### (i) *Aboriginal Jurisdiction or Sovereignty*

The plaintiffs adduced a great deal of evidence directed towards establishing actual control of the territory. This evidence consisted largely of historical reminiscences by elders of events in their lifetime, and the recitation of the declarations of their immediate, deceased ancestors. The plaintiffs ask me to infer that the practices they describe were a continuation of long standing, pre-existing aboriginal ownership of and jurisdiction over territory.

In fact, however, the plaintiffs seemed to have considerable difficulty with this claim for aboriginal sovereignty. Mr. Neil J. Sterritt is a Gitksan hereditary chief and a former President of the Gitksan-Wet'suwet'en Tribal Council. He is perhaps the most knowledgeable of the Gitksan chiefs on their claim in this action as he was, until 1988, involved directly with the preparation of the case for several years.

In a brief submitted to the Penner Commission in 1983, Mr. Sterritt submitted:

> "Now, I want to talk to you about the Indian government of the past . . . So I can give you something maybe you can relate to . . . to understand what Indian government was for us in 1850 or even more recently . . .
>
> I want to tell you that the feast hall was our seat of government. It filled a legislative and judiciary function. It taught us how and why to govern . . .
>
> The feast filled many functions. One of the functions was settling disputes. It was a place to do something about succession, passing on what was being done, passing on property, passing on title . . .
>
> Remember, the feast hall is an oral tradition, not written. So how do you record the official events to be sure there is truth in the event and that the community understands it? You call a feast . . ."

Brown's reports in the 1820's and Mr. Loring's reports, starting in about 1890, hardly mention the feast, particularly as a legislative body. In fact, one of Loring's principal functions seemed to have been the settlement of disputes, and the evidence strongly suggests that it was he who "governed" the territory. I do not suggest the Indians have not always participated in feasting practices, and I accept that it has played, and still plays, a crucial role in the social organization of these people. I am not persuaded that the feast has ever operated as a legislative institution in the regulation of land. There are simply too many instances of prominent Chiefs who have conducted themselves other than in accordance with the land law system for which the plaintiffs contend. I shall discuss these inconsistencies when I come to deal with internal boundaries in Part 17.

The plaintiffs' position on jurisdiction was described at trial, somewhat tortuously, by Mr. Sterritt. Under crossexamination, he was asked about jurisdiction. He gave the following evidence at vol. 134. p. 8282:

> MR. GOLDIE:
> Q: Mr. Sterritt, I'll put the question that I put to you a minute ago, and with the assistance of my friend's concern, you can answer it as best you see fit and then we can go from there. Do the plaintiffs claim that such laws, that is to say the laws and customs of the Gitksan, supersede the laws of the province if the two are in conflict?
>
> A: I don't know.
>
> Q: Is it your understanding that the plaintiffs claim that such laws supersede the laws of the province if the two are in conflict?
>
> A: I don't know.
>
> Q: Do you, as a plaintiff, assert that the laws of the Gitksan supersede the laws of the province if the two are in conflict?
>
> A: That's fairly complex, and I'm unable to answer that question.
>
> Q: You have no opinion or you have not given any consideration to that at all?
>
> A: No, not — no, I haven't. Not detailed consideration.
>
> Q :Well, whether detailed or otherwise, have you given it sufficient consideration to answer the question whether it is your position as a plaintiff in this case that the laws of the Gitksan and the customs of the Gitksan supersede the laws of the Province of British Columbia if the two are in conflict?
>
> A: No, I haven't.

In Re-examination by Mr. Rush, Mr. Sterritt was asked this:

> Q: "Mr. Sterritt, you answered this, that you did not know if the laws and customs of the Gitksan supersede the laws of the province if the two are in conflict. Now, my question to you is what is your understanding of the extent of the application of Gitksan and Wet'suwet'en laws?"

This led to an objection and some argument, but finally the re-examination continued at Volume 142, p. 8987 L. 16:

> MR. RUSH:
> Q: All right. Just let me reframe the question again for you Mr. Sterritt. You indicated in your evidence that you hadn't thought about the question of whether the province could make laws in respect of the resources of the Gitksan people, and then, as you have just heard me relate, you indicated that Canada and British Columbia do not have sovereignty in the Gitksan and Wet'suwet'en area. My question is can you explain what you meant by the two statements?
>
> A: The Gitksan and the Wet'suwet'en have sovereignty within that territory, within their territories. The Gitksan-Wet'suwet'en have their laws within those territories and the power to make laws within those territories. And the —excuse me — the Gitksan and Wet'suwet'en laws

prevail over the laws of the province within that territory — within the territories.

Q: Is that what you meant by sovereignty or is that what you mean by sovereignty?

A: Yes.

THE Court: Well, Mr. Sterritt, what do you want me to understand you mean when you say that the Gitksan and Wet'suwet'en have sovereignty and the power to make laws for the territories? Who makes the laws, the chiefs, the Houses, the clans, the tribal council, band councils, who?

THE WITNESS: The hereditary chiefs.

THE Court: Each for his own territory?

THE WITNESS: On behalf of the Houses.

THE Court: But by that answer do you presuppose the possibility of 50 or 60 different laws within — separate laws for each territory?

THE WITNESS: No, there are — based on the past there have been — laws have evolved over time for the Gitksan and Wet'suwet'en, and they — they are similar laws from one House to the next. They apply throughout the territory. And in a similar way laws passed by the Gitksan and Wet'suwet'en would be common throughout the territory. And there may be unusual circumstances in a given area or situation, but those would have to be dealt with as they arise, but the laws would apply throughout the territory.

THE Court: Well, what is the mechanism that you foresee for the making of these laws? Just hereditary chiefs?

THE WITNESS: The hereditary chiefs would have to — there might be a situation arises where a law has to be developed. In the — they might outline the parameters for which they wish to consider that law, but in the present times I think they would resort to a secretariat of advisors, who would provide them with information based on which they would make a decision about the law that — that is to be incorporated.

THE Court: Well, if, for example, they decide that there is some very choice timber that they want to log in the upper reaches of the Skeena, would the Wet'suwet'en chiefs have a say in that?

THE WITNESS: Not necessarily, but I wouldn't exclude that possibility. Similarly for the Gitksan and the Wet'suwet'en territories. They wouldn't necessarily, but it's possible that Gitksan and Wet'suwet'en chiefs, hereditary chiefs, would all be at the meeting in which they laid out the — the general concerns and general goals and objectives that they want a secretariat to work on and to bring back and advise in terms of the details that they could make a decision on.

THE Court: I take it there is no such mechanism in place at the moment, no secretariat or equivalent?

THE WITNESS: Well, no.

THE Court: Other than the tribal council?

THE WITNESS: The closest we come to it is the staff of the tribal council. But there — there is a recognition of a need for such a group, and what form that takes officially or otherwise is — you know — has not been discussed in detail, but it is such a — there is a necessity based on all of the information coming in to — that affects a given goal or direction or circumstance, that there is a need for this information and advice to come to the hereditary chiefs for them to weigh in terms of their own positions and their own — their own authority and in relation to their Houses?

THE Court: Mr. Sterritt, so there will be no unnecessary misunderstanding, when you say the staff of the tribal council, do you exclude the elected members when you say staff? Some people might say staff means the paid employees. Others might say it includes the elected members. What did you intend by saying staff?

THE WITNESS: Well, I should point out, I guess, to a certain extent how it worked while I was president. The hereditary chiefs may have had an issue or a problem that they were working on, and they outlined what they wanted done, and then as president either I or the executive director took that to the people that were available to us within the tribal council staff and worked out information, took that information back to the hereditary chiefs, and they reviewed it and — but it doesn't mean that there would be a tribal council. There could be a secretariat of some other form that would fulfil that function in a — in a way to be defined yet. But that would be the objective of that secretariat.

THE Court: All right. Thank you.

Q: Now, Mr. Sterritt, in what you have just described,in the view that you have just expressed, the secretariat, what relationship would that have, if any, to the feast?

A. The — well, there are feasts right now for a number of purposes, and we've talked about what they are. There are also feasts in which the hereditary chiefs could meet as similar to meeting in — in parliament, where they would — it would not be a feast necessarily put on by a House. It could be a feast put on by a number of hereditary chiefs to lay out this direction, to lay out what it is they're concerned about and how it would go forward. The Houses themselves who are directly affected, if it was their territory in their area, would have input into that and advise the hereditary chiefs about their concerns and their needs, and then they would set out a direction that would go to a secretariat. It would then go back through the same process and probably through the House to the hereditary chiefs where they gather. Those — that's a possibility. It's not something that's fixed, but it's one consideration that we've given. But the House that is directly affected in a given area would play an important role in terms of how they see the future of their territory and how it relates to the other territories . .

THE WITNESS: Maybe I should, just before we do break, go back to one thing on that other. If a law was applied by Canada or the province in that area, say, then the House and — I don't know whether I should use the word assembly of chiefs, but where the chiefs meet would have a veto power over any other laws that may be applied or considered. They could stop that because of the decisions that the hereditary chiefs and their goals for that given House territory in a given area.

THE Court: When you say laws of Canada, you mean laws of Canada or British Columbia or just Canada?

THE WITNESS: Yes, either or both . . . , It is apparent that on this issue the plaintiffs' thrust is directed not to historical practices and customs, but rather to undefined, unspecific forms of government which some of the chiefs are just beginning to think about. With respect, they have put the cart before the horse. This remedy could only be based on precontact practices, not upon the political wishes of a people seeking to establish a new form of government.

In argument Mr. Grant put the plaintiffs' case on jurisdiction as follows at vol. 337, p.p. 26421-26425:

> "Now, we are saying that the provincial laws do not apply to the plaintiffs and their land only insofar as they are inconsistent or repugnant with the ownership and jurisdiction of the plaintiffs. The laws of the Province do apply to non-Indians within the territory insofar as they are not inconsistent with the plaintiffs' ownership and jurisdiction.
>
> And I'm going to in the course of that articulation I'll come back to that, but in my argument when we deal with the jurisdiction as it relates to issues not connected to land and resources I'm coming to, the second arm of it though was a question raised whether the provincial laws have application to Gitksan and Wet'suwet'en people who are residing outside the boundaries. And, yes, they do. The provincial laws would apply outside the boundaries to Gitksan and Wet'suwet'en people. And the declarations aim only at the application of provincial laws within the territorial boundaries . . .
>
> THE Court: Well, what you're really saying is you want jurisdiction over matters of a local or private nature, civil rights and matters of a private nature within the territories. You want the same rights within the territory the Province has under Section 92, don't you?
>
> MR. GRANT: Vis-a-vis the plaintiffs, not vis-a-vis nonIndian people in the territory. The provincial laws would still apply to non-Indians. But let me — I'd like to —
>
> THE Court: Well, then you say what I have just stated is far too broad?
>
> MR. GRANT: Well, if you say what I'm seeking is — what we are seeking is jurisdiction — is to move the Section 92 from the Province to the plaintiffs for all purposes within the territory for anybody that happens to be there, yes, that is broader than what we're seeking . . .
>
> Now, the intent of the declaration of the right is intended to restrict the conduct of the provincial defendant from impeding the aboriginal right to govern themselves . . .
>
> A further example with respect to the education system could be considered if a Gitksan or Wet'suwet'en House, and I say House or House member. It could be a member of a House. Okay. It doesn't have to be the whole House, of course. Decided to withdraw their children from the school and educate them on the territory. They decided this was the appropriate way consistent with traditional training to take them out of school. Such a situation would be in conflict with the requirement that the children must attend school for a certain number of days of the year. The effect of the order of a declaration of self-government made by this Court would be that if the provincial defendant prosecuted that family or those families for violation of the School Act they could raise a defence they were educating their

> children in accordance with their aboriginal right of selfdetermination regarding education . . .
>
> The onus in such an application by the Gitksan would be to establish the right to educate their children outside the school system was part of the aboriginal selfgovernment. That issue would have to be decided on a specific basis with the specific facts.
>
> But the effect of the order we're asking your lordship to make would be that the declaration of the recognition of self-government as one of the aboriginal rights of the Gitksan and Wet'suwet'en, leads to the result that the plaintiffs or petitioners once they demonstrated that the alternative education formed an aspect of self-government in particular circumstances, the provincial law would not prevail. Once they overcame that hurdle on the particular facts on the particular case then the implication of the order we're seeking from this Court would apply.
>
> But this is the important point. Until the Gitksan and Wet'suwet'en exercise their authority in relation to education in a manner which conflicts with the provincial School Act, that act continues to apply. In other words, there is no point in theorizing about multiple challenges when there is no conflict . . .
>
> Just as the Province has been constrained from passing legislation contrary to the Charter of Rights and Freedoms, so is the Province constrained from passing legislation contrary to the aboriginal rights of the Gitksan and Wet'suwet'en to govern themselves and their people. I've already reiterated that the context of each — analysis of each legislation and consideration they contravene the rights of the plaintiffs is an issue that can only be considered in the context of that particular piece of legislation. In fact, my lord, it would still not resolve the issue if every section of every statute of the Province in existence today was analyzed and said this conflicts, this doesn't conflict."

Mr. Grant was obviously describing a new theory of government — a rationalization — unrelated in any way to aboriginal practices. I have never heard of it before, and it is certainly not mentioned in any authorities binding upon this Court.

It became obvious during the course of the trial that what the Gitksan and Wet'suwet'en witness describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves. I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another chiefs territory although there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissable. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.

For example, I was furnished with an analysis of the evidence of a number of witnesses who gave different versions of the "law" alleged to govern the use of a father's House territory. This was called "amnigwootxw" by the Gitksan and "neg'edeld'es" by the Wet'suwet'en. This is what some of the witnesses said about this alleged "law:"

> (a) "Amnigwootxw is when the son travels with his father on the territory, he will be with his father until his father dies. But after his father dies he does not say he owns this territory. He leaves and if he wants to go back there he has to get permission from the head

chief of that territory before he goes back on to the territory where him and his father were before": Solomon Marsden, Tr.94, p. 5948, 11. 22-29.

(b) Neg'edeld'es rights extend to grandchildren: Henry Alfred, Tr.51, p. 3130, 1.45 to p. 3131, 1.7.

(c) Neg'edeld'es rights last during the lifetime of the father only: Henry Alfred, Tr.51, p. 130, 11. 39-44.

(d) Neg'edeld'es rights last forever: Elsie Quaw, Ex. 673A, p. 19, 11.9-17.

(e) Neg'edeld'es rights can be extended beyond the life of the father but only with permission: Alfred Joseph, Tr.24, p. 1597, 1.29 to p. 1598, 1.7.

(f) Neg'edeld'es can be extended without permission, at least until the "name is taken up": Warner Williams, Ex. 677A, p. 36, 11.31-42.

(g) It is the son's privilege to trap on his father's land, even where the son did not ask permission: Vernon Smith, Tr.91, p. 5800, 1.46 to

p. 5801, 1.11 and p. 5813, 11.35-41. (h) Amnigwootxw can only be extended by permission, but permission cannot be denied. ". . . this person could not be refused if he goes to the chief and asks permission. He would not be refused, because when his father dies all the deceased person's children are taken by the Wil' na t'ahl as their own children and this is why they don't refuse them to go on to the territory": Solomon Marsden, Tr.94, p. 5948, 11.39-44. See also Art Mathews Jr., Tr.77, p. 4777, 11.27-32.

(i) Sarah Layton (Knedebeas) and her grandmother refused to give Roy Morris permission to trap on Knedebeas' territory. (But Mr. Morris continued to trap there).

(j) Neg'edeld'es rights can be acquired to the mother-in-law's territory: Stanley Morris, Ex. 669-1-A, p. 5,1.43 to p. 6, 1.11.

(k) Neg'edeld'es gives one rights to use a spouse's territory: Elsie Quaw, Ex. 673A, p. 18, 1.46 to p. 19, 1.8.

(l) Neg'edeld'es rights are limited: ". . . like my children would be allowed to go there as Neg'edeld'es, but they don't inherit the territory like on the mother's side": Dan Mitchell, Tr.60, p. 3644, 11.43-46.

(m) Neg'edeld'es rights are quite extensive. Johnny David claimed the rights were equivalent to caretaker rights, and accordingly he had the right to choose the successor (Tr.156, p. 10009, 11.8-32 and Ex. 74-D, p. 44) and to challenge the head chief's (according to Ex. 646-9B) authority over the territory. "Leonard George is Smogelgem and also I can't agree with him taking the territory, but he can utilize it." (Tr.156, p. 10009, 11.43-45)

(n) The right may extend to the territory of the father's house or clan: Henry Alfred, Tr.51, p. 3130, 11.39-44.

It is my conclusion that Gitksan and Wet'suwet'en laws and customs are not sufficiently certain to permit a finding that they or their ancestors governed the territory according to aboriginal laws even though some Indians may well have chosen to follow local customs when it was convenient to do so.

Doing the best I can with this evidence, and I have tried to take into consideration all that I heard, I conclude that prior to British sovereignty the ancestors of the plaintiffs lived in their villages at strategic locations alongside the Skeena and Bulkley Rivers and they probably organized themselves into clans and houses for social purposes, but they had little need for what we would call laws of general application. While peer pressure in the form of customs may have governed the villages, there was, in my judgment, no difference between aboriginal sovereignty or jurisdiction in the largely empty lands of the territory on one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand.

I also incorporate into this section the conclusions I expressed earlier regarding the relationship between land use and fur trapping which only started after contact. Before that time there was no reason for the plaintiffs' ancestors, individually or communally, to purport to govern the wilderness beyond the areas surrounding their villages even though they may have used such areas from time to time for aboriginal purposes.

### (ii) *Aboriginal Ownership*

I digress to discuss the question of village sites.

The distinction between village sites and other lands was recognized in one form or another in the Report of the Parliamentary Committee inquiring into New Zealand, by Herman Merivale, Governor Douglas, Begbie J. and even Mr. Trutch. In fact, the legislation of the Colony exempted village sites or settlements from pre-emption and they were protected from all other intrusions. This distinction was probably the reason for the creation of reserves.

In both the colony and province of British Columbia it was intended that village sites would be included within reserves and permanently set apart for the use of Indians. I know of no occupied village in the territory that was not included within a reserve except Gitanka'at and Gitangasx which are now abandoned, and may have been abandoned at the time reserves were established. I recall no evidence of when they were deserted. There are small reserves in the area of Gitanka'at. Both of these locations should have been designated as reserves in the 1890's if they were then occupied as villages.

I do not think it is necessary to enquire into the legal status of Indian reserves. Indian interest in reserves is now statutory and I have no jurisdiction to adjust reserves. In fact, it was not argued that I should.

It seems clear that some hunting grounds adjacent to villages were not included in reserves notwithstanding the instructions given to the reserve commissioners both in colonial and provincial times. It is regrettable that this question was not resolved at the time of the McKenna-McBride Commission which did have jurisdiction to adjust reserves. It is equally regrettable that the Indians themselves did not take more effective steps to secure larger reserves if they really wished to have larger tracts of land allotted to them.

Even if I had jurisdiction to adjust reserves, the parties advanced no evidence or argument for special status for any specific lands surrounding Indian villages although it seems obvious some reserves should be larger than they are. It was mentioned at trial that all Indian reserves in the territory total only about 45 square miles although it is significant that many of them are strategically located, and most of the fishing sites identified by the plaintiffs are within reserves.

I do not, therefore, propose to make any special order regarding village sites, or surrounding hunting lands. They are either already included in Indian reserves or they must be considered on the same footing as the other lands of the territory. No doubt the province will wish to correct this historical anomaly, but not necessarily by "adjusting" reserves. I say this because there may be better ways to adjust this grievance.

In my judgement, what happened on the ground before British sovereignty was equally consistent with many forms of occupation or possession for aboriginal use as for ownership. It is true that trader Brown referred to some Indians as men of property and other similar terms but that is equivocal. He also suggested exclusive use of some undefined land was restricted to trapping for beaver.

In this century, long-time settlers such as Mr. Shelford were, until very recently, unaware of any claim to aboriginal ownership or control of the territory or of any claim to an interest inconsistent with the activities of himself and other white settlers. When there were disputes with settlers or governments, of which there were not many, the Indians often accepted solutions which denied aboriginal ownership. Apart from village sites, and political statements which have frequently been repeated by Indians, I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal use in a way that would justify a declaration equivalent to ownership. Further, I find that, except for occasional political statements, the plaintiffs in the post sovereignty period seldom conducted themselves as if they believed they were owners of such vast areas.

I was also treated to extensive arguments about the legal ingredients of ownership. Most of these authorities were American cases which were decided in a totally different legal and factual context from the situation in British Columbia and they do not overcome the binding authority of **St. Catherine's Milling** about the nature of non-proprietary aboriginal interests. It seems to me, with respect, that the Privy Council got it right when it described the aboriginal interests as a personal right rather than a proprietary one.

In this respect, I note the Privy Council had an opportunity to comment on this question again in 1921, more than 30 years after **St. Catherine's Milling,** in **Amodu Tijani v. The Secretary, Southern Nigeria,** [1921] 2 A.C. 399, particularly at p. 404 where their Lordships continued to refer to "native title" as a "possessory title" and as a "usufruct" with variable customs in different countries.

I am satisfied that at the date of British sovereignty the plaintiffs ancestors were living in their villages on the great rivers in a form of communal society, occupying or using fishing sites and adjacent lands as their ancestors had done for the purpose of hunting and gathering whatever they required for sustenance. They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that Gitksan or Wet'suwet'en law or title followed (or governed) these people except possibly in a social sense to the far reaches of the territory.

To put it differently, I have no doubt that another people, such as the Nishga or Talthan, if they wished, could have settled at some location away from the Gitksan or Wet'suwet'en villages and no law known to me would have required them to depart.

While these are my findings, I am prepared to assume for the purposes of this part of my judgment that, in the legal and jurisdictional vacuum which existed prior to British sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages. I would not make the same finding with respect to the rest of the territory, even to the areas over which I believe the ancestors of the plaintiffs roamed for sustenance purposes.

### 3. The Effect of British Sovereignty

Upon the Crown through the Imperial Parliament establishing the Colony of British Columbia in 1858, it authorized the appointment of a Governor, made arrangements for a Legislative Council, imposed English law, and embarked upon the construction of a legal regime for the ownership and governance of the Colony. This, in my view, is what sovereignty is all about, but Professor Dicey has a more complete definition in his **Law of the Constitution,** (10th edition), 1959 at p. 39:

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."
>
> A law may, for our present purpose, be defined "any rule which will be enforced by the courts". The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: **There is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.** (my emphasis)

This, in my view, is what the Court meant in **Sparrow** when it said, as quoted above:

> "... there was from the outset never any doubt that sovereignty and legislative power and indeed the underlying title to such lands vested in the Crown ..."

Although not binding upon me but deserving deference, is the opinion of the Privy Council in **Re Southern Rhodesia,** [1919] A.C. 211, at p. 224:

> "... According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council."

That, in my view, is what happened in the territory, that is the aboriginal system, to the extent it constituted aboriginal jurisdiction of sovereignty, or ownership apart from occupation for residence and use, gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems. This process was described in

**Attorney General for British Columbia v. Attorney General for Canada,** [1906] A.C. 552, (J.C.P.C.), (the Deadman's Island Case), where it was suggested that matters had begun in the colony:

> "... by the indiscriminate squatting of adventurous settlers in a wild country. The initiation of the reign of law may be taken to date from the advent of Governor Douglas in 1858. By an Act of Parliament passed in that year British Columbia was erected into a separate territory, and power was given to Her Majesty by Order in Council to appoint a governor and make such provisions for the laws and administration of the new Colony as to her should seem fit.
>
> "Accordingly Sir James Douglas was in 1858 appointed governor by letters patent, and an Order in Council was made defining his powers and duties. As to his powers, it may be said at once that they were absolutely autocratic; he represented the Crown in every particular, and was, in fact, the law. At the same time careful despatches were sent to him by the Colonial minister of the day laying down in explicit terms the methods of administration which it was desired he should follow."

After that, aboriginal customs, to the extent they could be described as laws before the creation of the colony became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any force, as laws, within the colony.

Then, at the time of Union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts. In 1888 the Privy Council in **St. Catherine's Milling,** decided that aboriginal interests in Ontario existed only at the pleasure of the Crown, and the same was recognized for British Columbia in **Calder.** Rights which are subject to extinguishment can hardly be absolute, as jurisdiction and ownership would be expected to be.

Even after the addition of s. 35 of the **Constitution Act, 1982,** which recognized aboriginal rights, it was held in **Sparrow,** at p. 1109 that:

> "... We find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint upon the exercise of sovereign power. **Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91 (24) ...**"
> (my emphasis)

If there was aboriginal sovereignty it would be valid against Federal as well as provincial jurisdiction, but it clearly is not.

### 4. Conclusions on Jurisdiction and Ownership

After much consideration, I am driven to find that jurisdiction and sovereignty are such absolute concepts that there is no half-way house. No Court has authority to make grants of constitutional jurisdiction in the face of such clear and comprehensive statutory and constitutional provisions. The very fact that the plaintiffs recognize the underlying title of the Crown precludes them from denying the sovereignty that created such title.

I fully understand the plaintiffs' wishful belief that their distinctive history entitles them to demand some form of constitutional independence from British Columbia. But neither this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award.

I also understand the reasons why some aboriginal persons have spoken in strident and exaggerated terms about aboriginal ownership and sovereignty, and why they have asserted exemption from the laws of Canada and the province.

They often refer to the fact they were never conquered by military force. With respect, that is not a relevant consideration at this late date if it ever was. Similarly, the absence of treaties does not change the fact that Canadian and British Columbian sovereignty is a legal reality recognized both by the law of nations and by this Court.

The plaintiffs must understand that Canada and the provinces, as a matter of law, are sovereign, each in their own jurisdictions, which makes it impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek. In the language of the street, and in the contemplation of the law, the plaintiffs are subject to the same law and the same Constitution as everyone else. The Constitution can only be changed in the manner provided by the Constitution itself.

This is not to say that some form of self-government for aboriginal persons cannot be arranged. That, however, is possible only with the agreement of both levels of government under appropriate, lawful legislation. It cannot be achieved by litigation.

In view of the foregoing, it is not necessary for me to say anything about the absence of representation by Gitksan or Wet'suwet'en persons (or children or persons under legal disability) who may not wish to have aboriginal jurisdiction and authority imposed upon them.

As to ownership, I have concluded that the interest of the plaintiffs' ancestors, at the time of British sovereignty, except for village sites, was nothing more than the right to use the land for aboriginal purposes and I shall consider that question more fully in this next section of this Part.

It follows, therefore, that the plaintiffs' claims for aboriginal jurisdiction or sovereignty over, and ownership of, the territory must be dismissed.

## 5. Aboriginal Rights

As already mentioned, the plaintiffs' claims for aboriginal rights must depend upon indefinite, long aboriginal use of specific territory before sovereignty.

### (a) The Requirements for Aboriginal Rights

It will be convenient to repeat the requirements for aboriginal rights described by Mahoney J. in the Baker Lake case at pp. 557-558. They are:

> "1. That they [plaintiffs] and their ancestors were members of an organized society.
>
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.

> 3. That the occupation was to the exclusion of other organized societies.
>
> 4. That the occupation was an established fact at the time sovereignty was asserted by England."

I am uncertain about the requirement for exclusivity. Such would certainly be essential for ownership and jurisdiction but I suspect there are areas where more than one aboriginal group may have sustenance rights, such as in the areas between the closely related Wet'suwet'en and Babine peoples at Bear Lake and along the Babine River, and possibly in other peripheral areas. I cannot accept that two aboriginal peoples who both used land for sustenance would not each have aboriginal rights to continue doing so although they would not be exclusive rights.

I also think a further requirement must be added to the tests formulated by Mahoney J. What the law protects is not bare presence or all activities, but rather aboriginal practices carried on within an aboriginal society in a specific territory for an indefinite or long, long time. This relates to what I have just said about commercial trapping.

Subject to the above and to the other considerations mentioned in this judgment, I am satisfied that the tests stated by Mahoney J. accord generally with the authorities and I am content to adopt them. I shall discuss them individually, and I shall add some further comments.

(i) *Ancestors in an Organized Society*

I suspect the requirement of social organization comes from dicta in cases such as **Calder** where Judson J. referred to the Nishga as "organized in societies and occupying the land as their forefathers had done for centuries . . ."

If it were necessary to find that the Gitksan and Wet'suwet'en, as aboriginal peoples rather than villagers had institutions and governed themselves, then I doubt if this requirement has been satisfied. I have already discussed this earlier in this Part.

I think, however, there is much wisdom in the dictum of the Privy Council in **Re Southern Rhodesia,** [1919] A.C. 211 at pp. 233-234,

> "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe.' On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit."

I am quite unable to say that there was much in the way of pre-contact social organization among the Gitksan or Wet'suwet'en simply because there is so little reliable evidence. Based upon **Re Southern Rhodesia,** however, I find that no particular level of sophistication should be required. I adopt the view of Mahoney J. at p. 559 of **Baker Lake** that:

> ". . . the relative sophistication of the organization of any society will be a function of the needs of its members, [and] the demands they make of it."

Assuming Gitksan and Wet'suwet'en village customs furnished whatever social organization the law requires, I accept the opinion of Professor Ray that the minimal social organization described by trader Brown at Babine Lake in the 1820's could not have been borrowed or developed just since contact. This, and the further facts that there were villages in the vicinity of Kisgegas and reports of larger Skeena villages to the west, and the probability I have already expressed that some of the ancestors of the plaintiffs have been present in the territory for a long, long time, persuade me this requirement has been satisfied.

#### (ii) *The Occupation of Specific Territory*

I shall deal with this question in greater detail later but for the moment it will be sufficient to say that there is evidence of Indians living in villages at important locations in the territory. I infer they would have used surrounding lands, and other lands further away as may have been required. This is sufficient to satisfy this part of the test for the areas actually used.

#### (iii) *The Exclusion of Other Organized Societies*

While I have the view that the Gitksan and Wet'suwet'en were unable to keep invaders or traders out of their territory, there is no reason to believe that other organized societies established themselves in the heartland of the territory along the great rivers on any permanent basis, and I think this requirement is satisfied for areas actually used.

#### (iv) *Occupation Established at Time British Sovereignty Asserted*

I have already decided there is no practical difference in this case between the date of contact and the date of sovereignty. For the purposes of this test, I find some Gitksan and Wet'suwet'en had been present in their villages and occupied surrounding areas for aboriginal purposes for an uncertain, long time before British Sovereignty.

#### (v) *Long Time Aboriginal Practices*

This brings me to the additional test for aboriginal rights which I have added to those mentioned by Mahoney J. in **Baker Lake.** I have already discussed this generally, and I have concluded that the aboriginal activities recognized and protected by law are those which were carried on by the plaintiffs' ancestors at the time of contact or European influence and which were still being carried on at the date of sovereignty, although by then with modern techniques. I have already decided that trapping for the fur trade was not an aboriginal activity.

### (b) The Nature of Aboriginal Rights

#### (i) *Generally*

Having decided that aboriginal rights are residential and sustenance gathering rights, it is unnecessary and probably unwise, to attempt a precise definition. This was attempted in **Attorney-General of Ontario v. Bear Island Foundation** (1984) 15 D.L.R. (4th) 321 where Steel J., for the purposes of that case, offered the following at p. 360:

> "Bearing in mind the decisions in the **Calder** and **Smith** cases, I find that the aboriginal rights in these lands existing at the relevant date are as follows: To hunt all animals for food, clothing, personal use and adornment, to exclusively trap fur bearers, which right was enjoyed by the individual family, and to sell the furs, to fish, use herbs, berries, maple sugar and other natural products for food, medicines and dyes, to use ochre and vermilion for dyes, to use turp, quartzite for tools and other implements but not extensive mining, to use clay for pottery, pipes and ornaments, to use trees, bark and furs for housing but not lumbering, and to use trees and bark for fires, canoes, sleighs and snowshoes. All of the above are traditional uses for basic survival and personal ornamentation existing as of 1763."

I quote the foregoing only as an example of what was held to be included as generic "aboriginal rights" in that case. I do not accept such definition except as an example, firstly because 1763 is not an appropriate date for determining what was an aboriginal right in this case, and because I respectfully disagree that trapping fur bearing animals for the sale of furs was ever an aboriginal activity in the territory.

In my view, the aboriginal rights of the plaintiffs' ancestors included all those sustenance practices and the gathering of all those products of the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival, including wood, food and clothing, and for their culture or ornamentation — in short, what their ancestors obtained from the land and waters for their aboriginal life.

As I have said, the date of British sovereignty for this purpose is equivalent to the date of contact because although modern techniques must clearly be recognized, the nature and extent of aboriginal rights did not change in that period.

(ii) *Commercial Activities*

This requires me to consider the comments of the Supreme Court of Canada on this question in **Sparrow** where the Court declined to discuss the question of commercial aboriginal rights. At p. 20 it said:

> "In the Courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes."

While the Supreme Court of Canada will ultimately be called upon finally to settle this important question, I am not able to avoid expressing an early judicial opinion. In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is to hunt and fish and collect the products of the land and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices.

As I understand the authorities, subject to what I shall say later in this judgment, and subject to the requirements I have already described, the law has protected the right of aboriginal groups to continue to use "traditional" lands for these purposes.

In my view, using fishing as an example, it would be contrary to the rational evolution of aboriginal rights, and contrary to principle, to enhance an aboriginal right by providing priority over all other users (after justified conservation), and then to enlarge or extend the prioritized aboriginal right to commercial activities when many aboriginals are already employed in this industry. It would be foolish to suggest, for example, that the prioritized aboriginal rights of an Indian participating in the commercial fishing industry would be exempt from the regulations which govern non-Indian licensees.

I digress from this discussion of aboriginal rights to recognize that **Sparrow** was written in the context of tidal fishing, while the plaintiffs, particularly the Gitksan, are most anxious to establish what they call a commercial, inland fishery at Gitwangak, and possibly at other Skeena locations.

As I understand the evidence, particularly that of Mr. Glen Williams, salmon stocks have risen to levels not seen since the early years of this century. This is because of salmon spawning enhancement programs in the Babine system. As a result, Mr. Williams says upwards of one million salmon are unable some years to enter the spawning streams. Some of the plaintiffs wish to take quantities of salmon from the Skeena River at Gitwangak or other locations for commercial purposes in order to raise much needed funds for Band purposes.

Not having heard the other side of this question from the officials of the Department of Oceans and Fisheries (Canada), I am unable to express any views on the merits of this proposal. In my view, however, such an enterprise could not be conducted as an aboriginal right and would have to be arranged, if at all, by agreement with the Crown.

There is another reason for my conclusion that land-based commercial enterprise cannot be regarded as an aboriginal right. From the beginning of the colony, Indians have had equal rights with everyone else to use the unoccupied land of the Crown. This user right has not been restricted to "traditional" lands either for aboriginal sustenance or for commercial purposes pursuant to the general law. Now, as pointed out in **Sparrow,** we live in a society which is becoming "increasingly more complex, interdependent and sophisticated."

Many aboriginals are directly engaged in the wage economy, and a few — not enough, but some — participate as entrepreneurs. Mr. Pete Muldoe, a prominent Gitksan hereditary chief, has engaged in logging and sawmilling in the territory, as has the Moricetown Band Council. The aboriginal communities, like the provincial community, have their economic successes and failures.

Notwithstanding the complexity of mixed land use in the province, I think aboriginal rights, to the extent recognized by law, have always been sustenance user rights practised for a very long time in a specific territory. These rights do not include commercial activities, even those related to land or water resource gathering, except in compliance with the general law of the province.

### (iii) *Exclusivity*

Aboriginal rights have never been absolute. As long ago as **Johnson v. M'Intosh,** and as confirmed by the Privy Council in **St. Catherine's Milling Co.**, in the absence of contract or treaty, such rights have been recognized to exist merely at the Crown's pleasure. In **Sparrow,** aboriginal rights were expressly stated not to be absolute.

The aboriginal right to fish for food discussed in **Sparrow** was clearly not exclusive to the Musqueam. As Dr. Suttle (a witness) said in **Sparrow:**

> "No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others" (at p. 1094).

In addition to the Musqueam, many other Indians and non-Indians share the Fraser River fishery. The evidence in this case shows parts of the territory are shared with other Indians, particularly the Babine people at Bear Lake, along the Babine River, and in the south.

The question whether an aboriginal right, when established, is exclusive as against the Crown and others has not been decided authoritatively because it was not until quite recently that a claim for such rights has ever been maintained against the Crown.

The law is clear that both Canada and the province, in the exercise of their undoubted sovereignty, may enact legislation which affects Indians and lands reserved for Indians. Canada, within its jurisdiction, may legislate directly, while British Columbia's laws of general application may in many circumstances vitally affect Indians. In this respect, Martland J. speaking for the majority said in **Cardinal v. Attorney General of Alberta,** [1974] 2 S.C.R. 695 at 703:

> "A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the British North America Act, 1867, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded."

It goes without saying that the foregoing, relating to reserves, must apply with at least equal force to non-reserve lands which are subject to an aboriginal sustenance right. Many cases such as **Cardinal, Dick v. the Queen,** (1985) 22 C.C.C. (3d) 129 (S.C.C.); and **R. v. George,** [1966] S.C.R. 267 have found provincial laws regulating such basic aboriginal practices as hunting for moose, deer and migratory birds to be valid.

In the face of this, and in view of the fact that Indians have always had access to all vacant Crown land, it is difficult to understand how, apart from the question of priorities, an aboriginal sustenance right in such a remote land could be an exclusive right. If it was exclusive originally, it has been changed throughout history in the same way the Fraser River fishery is no longer exclusively an aboriginal fishery.

The question of exclusivity is, of course, subject to the principles discussed in **Sparrow** regarding reconciliation and priorities etc. which I need not discuss at this time.

## 6. Conclusions on Aboriginal Rights

Subject to what follows, the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define. These aboriginal rights do not include commercial practices.

# PART 15

# EXTINGUISHMENT AND FIDUCIARY DUTIES

## 1. General Principles

In its Statement of Defence the province pleads the plaintiffs' aboriginal rights or "title", if any, was extinguished by the operation of the **"Calder XIII"** enactments passed during the colonial period and by many other colonial regulations, proclamations, ordinances and enactments (included in Ex. 1200-1 and 1200-2) as well as "administrative actions pursuant to [the] statutes and statutory instruments." These were all introduced into evidence.

In addition the province, by its "alienations project," introduced a large collection of documents which together with the earlier documents mentioned record pervasive colonial and provincial Crown presence in the territory up the date of the writ.

All this documentation demonstrates colonial and provincial dominion over the territory before and since Confederation by such diverse governmental and administrative activities as surveying, grants of land, leases and other tenures, land registry, schools and hospitals, rights of way for highways, power and pipe lines, grants in fee simple, forestry, mining, and guide outfitting permits, various public works, the creation and governance of villages and municipalities, water and other placer rights and licences, trapline registration for all or almost all of the territory, fish and game regulation and conservation, and a host of other legislatively authorized intrusions into the life and geography of the territory. Some of this material, of course, related only to post-confederation British Columbia.

The province also established by documentary evidence that most of the **Calder XIII** legislation was actually enacted not just in the colony, but also by the Imperial Parliament.

For its part, Canada also adduced extensive evidence of the federal presence in the territory, including the right of way and installations for the main line of the Grand Trunk Pacific Railway (now the northern branch of the C.N.R.), airports, fishery and police establishments and, of course, Indian reserves.

A sampling of this volume of documents and other exhibits demonstrates that the evidence in this case goes far beyond the **Calder XIII** enactments which were more or less the extent of the extinguishment evidence which was before the Court in that case. It seems unlikely that the enactment of the **Calder XIII** Ordinances by the Imperial parliament was proven in that case because Hall J. said he doubted the jurisdiction of the colony to pass enactments that could extinguish aboriginal rights. He appears not to have been aware that some of this legislation had also been enacted by the Imperial Parliament.

The province argues that it cannot rationally be asserted that, standing alongside this all-embracing governmental structure, there are many parallel aboriginal governments and separate systems of ownership or rights to use a substantial portion of the province by what is now such a small segment of the population. The plaintiffs counter that their rights are unchanged from what they were at the date of sovereignty.

The underlying purpose of exploration, discovery and occupation of the new world, and of sovereignty, was the spread of European civilization through settlement. For that reason, the law never recognized that the settlement of new lands depended upon the consent of the Indians. However, as mentioned by Taschereau J. in **St. Catherine's Milling,** and by others, many of the original North American colonies, for reasons of practicality or necessity, entered into treaties with their sometimes unfriendly aboriginal neighbours. That situation did not arise in this province except briefly in the Colony of Vancouver Island.

Even the language of the **Royal Proclamation, 1763** makes it plain that the Crown did not consider it necessary to obtain the consent of the Indians to exclude their interests. Although the Crown set aside vast areas for hunting grounds at the Crown's "pleasure," the lands east of the Alleghenies, the old province of Quebec and Rupert's Land were all excluded from the Proclamation and these regions were all appropriated to different regimes, although some of such lands may have been the subject of a treaty. Rupert's Land later became the subject of the numbered treaties under a completely different regime because of a completely different history from British Columbia. There were a number of different experiences in various parts of what is now the United States. There is, in fact, no uniform history for all of the regions of North America, and none of them had a history similar to British Columbia.

It will be useful to mention that, because of the division of powers between Canada and the provinces at the time of Confederation (1871 for British Columbia), it has been convenient to consider these matters from the perspective of Colonial times. That is because Crown authority in those days was undivided. Thus no division of powers question can arise about the authority of the Crown to extinguish aboriginal rights in the colonial period.

It will not be necessary for me to trouble myself with the question of whether, since Confederation, the province has had the capacity to extinguish aboriginal interests. This is a vast legal and constitutional question which has not been fully explored, although it has been decided in a number of cases that some provincial legislation applies to Indians and can diminish their rights to engage in aboriginal activities.

It will also be unnecessary for me to consider the full meaning and effect of s. 35 of the **Constitution Act, 1982** although there is language in the judgment of the Supreme Court of Canada in **Sparrow** from which it might be argued that aboriginal interests which could be extinguished before 1982 may also be extinguished after that date.

The reason I do not have to consider those questions is because of the conclusions I shall express in this Part about the effect of pre-Confederation colonial legislation.

The right of the Imperial Crown to proceed with the settlement and development of North America without aboriginal concurrence was confirmed by the Privy Council in the **St. Catherine's Milling** case. This was expressed in practical terms by stating that "Indian title" existed at the pleasure of the Crown.

I have already described the considerations which governed the thinking of those responsible for the establishment of the Colony of British Columbia, and it would certainly have come as a surprise to Governor Douglas and his colleagues, and to the Colonial Secretaries and the Imperial Privy Councillors if it had been suggested to them that the consent of the Indians was required before the settlement of any part of the colony could be undertaken. Some of them thought the so-called "Indian title" (which I equate to aboriginal rights), except with respect to village sites, "should" be extinguished by treaty, but they obviously did not believe that was a pre-condition to the settlement of the colony.

It would be wrong to attribute legal understanding to these men on the basis that they were familiar with the law relating to aboriginal rights as we know it today from cases such as **Calder, Guerin** and **Sparrow.** Even **St. Catherine's Milling** was 30 years into the future. The proceedings of the Parliamentary Committee on New Zealand would more likely be the authority they would have in mind.

Possibly because of experiences in Ontario some of them believed "Indian title" should be extinguished by treaty and the payment of annuities, but even on Vancouver Island where some treaties had been arranged, the colonial officers obviously considered themselves under no obligation to do so. There was much settlement there without treaties. No treaties of any kind were arranged on the mainland.

It would not be accurate to assume the colonial officials, or their masters in London, chose wilfully to ignore aboriginal interests. As the evidence shows, their intention was to allot generous reserves, and to satisfy the requirements of the Indians in that way, and to allow Indians to use vacant Crown land.

Their policy, which was the Crown's policy, was clearly expressed. It was that village sites, cultivated fields and reasonable surrounding hunting grounds would be secured to the Indians by reserves, but the rest of the colony belonged to the Crown and would be made available for settlement.

I have no reason to find these colonial officials, both on the ground here in British Columbia and in London, did not believe the Indians should be treated fairly in a way consistent with the settlement of the colony. The writings of Governor Douglas on this question clearly disclose not just an intention, but also instruction to his officers, that reserves were to be allotted generously.

At the same time, it is obvious none of these colonial officers believed the settlement of the colony depended in any way upon Indian consent. Neither did they believe Indian presence on non-reserve land precluded settlement. In fact, they believed that in most cases the Indians would secure the lands they wished in the form of reserves and that they would not be harmed by settlement.

While the foregoing describes the state of mind of colonial officials at the start of the colonial period, the social disadvantage of the Indians was ongoing and largely but not entirely unrecognized. For this reason it is difficult, but necessary, to keep the difference between legal rights and social wrongs very much in mind. However much one may regret the failure of the colonists to recognize or react to the differences between the two communities, the legal consequences arising from the rights of the parties must be determined objectively from the constitutional and legal measures taken in that period rather from social and economic failures.

It was in this context that the **Calder XIII** and other legislation was enacted by the colony and in some cases by the Imperial Parliament.

I now propose to discuss the law relating to the question of extinguishment of aboriginal interests. After that I shall attempt to apply this law to the plaintiffs' claims in this action.

I must start with the proposition that the plaintiffs' aboriginal rights in the territory at the time of sovereignty existed during the "pleasure of the Crown." That, in my view, is established by binding Privy Council and Canadian jurisprudence of which **St. Catherine's Milling** is the leading authority. It is possible the officers of the Crown did not have that precise language in mind in the 1850's and 1860's but that seems to have been the law, as it was then understood, and as it was later stated to be in **St. Catherine's Milling.**

This brings me to **Calder,** which was the principal authority on extinguishment until **Sparrow.** As I have said, **Calder** was an unusual case because of the way it was argued. Counsel agreed to facts from which an entitlement to common law aboriginal rights to over 1,000 square miles in the lower Nass valley could be inferred. The principal issue considered by all the judges of the Supreme Court of Canada (except Pigeon J.) was whether the **Calder XIII** and other enactments extinguished all those rights.

There was another issue which was considered at the trial in **Calder** and on the appeal to the Court of Appeal. It related to the question of whether there could be aboriginal rights without a Crown grant or recognition. The Crown's argument on that question found favour with both the trial judge and all three members of the Court of Appeal but it was not accepted in the Supreme Court of Canada. Since that time it has been decided by **Guerin** and other authorities that aboriginal rights arise by operation of law from indefinite, long time use of specific lands for aboriginal purposes. I have accepted that and I do not propose to consider it further.

The trial judge and all three judges of the Court of Appeal in **Calder** also dealt with the question of extinguishment as did six of the seven judges who heard the appeal in the Supreme Court of Canada.

At (1969) 8 D.L.R. (3rd) 59, the trial judge, Gould J. said at p. 82:

> "All **(Calder)** thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim."

In the Court of Appeal, Tysoe J.A. with whom the Chief Justice agreed, gave the majority judgment. On the question of extinguishment he referred to many of the same dispatches I have mentioned and from that source he extracted the policy of the Crown to open the colony for settlement. At (1970) 74 W.W.R. 481, at p. 500, he said that such policy ". . . necessarily involved the extinguishment of Indian title."

Then, after reciting the colonial enactments, and some of the dispatches which I have already cited, Tysoe J.A. said at p. 518:

> ". . . The remainder of the unoccupied lands were thrown open for settlement. Thus complete dominion over the whole of the lands in the Colony of British Columbia adverse to any tenure of the Indians under Indian title was exercised. The fact is that the white settlement of the lands which was the object of the Crown was inconsistent with the maintenance of whatever rights the Indians thought they had."

At p. 533, Maclean J.A. said:

> "It is not disputed that the old Colony of British Columbia had complete legislative jurisdiction to extinguish the so-called "Indian title", if in fact any such "title" ever existed.
>
> To use the words of Douglas J. of the United States Supreme Court in **U.S. v. Sante Fe Pac. Ry,** supra, at p. 347, the title of the Indians, if it ever existed, was extinguished when the pre-Confederation govern-

> ments of British Columbia exercised "complete dominion adverse to the right of occupancy" of the Indians . . ."

I turn now to the judgments in the Supreme Court of Canada.

There is nothing in the judgment of Judson J. in the Supreme Court of Canada suggesting that extinguishment depended upon the consent or agreement of the Indians. Hall J. seems to agree that aboriginal rights were extinguishable but he suggested at p. 402 that this could only be accomplished by surrender or express legislation. I observe that consent would not be required for the latter.

Judson J., speaking for himself and two other judges, found the **Calder XIII** enactments did indeed extinguish the aboriginal rights of the Nishga. At p. 333 he agreed with the passage I have quoted above from the summary of the trial judge

Then, at pp 334-335 Judson J. quoted from **U.S. v. Santa Fe Pacific Ry. Co.,** (1941), 314 U.S. 339 at p. 347:

> "'Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. **Buttz v. Northern Pacific Railroad,** 119 U.S. 55, 66 S. Ct. 100, 30 L. ed. 330. As stated by Chief Justice Marshall in **Johnson v. M'Intosh** [supra] at p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, **by the exercise of complete dominion adverse to the right of occupancy, or otherwise,** its justness is not open to inquiry in the Courts. **Beecher v. Wetherby** (1877), 95 U.S. 517 at 525, 24 L. ed. 440 at 441.'" (my emphasis)

Judson J. also referred to **Re Southern Rhodesia,** [1919] A.C. 221 (J.C.P.C.), which he said was to the same effect.

The view of Judson J. is best captured in the following passages from his judgment at p. 344 where he quoted from the American case **Tee-Hit-Ton Indians v. U.S.,** (1955) 348 U.S. 272 (U.S.S.C.) as follows:

> "'This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.'"

Judson J. then continued with his own conclusion at the same page:

> "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."

Hall J. reached a different conclusion. He first decided that aboriginal rights arose either by operation of law or by reason of the **Royal Proclamation, 1763,** (which he found to apply to British Columbia), and secondly he considered the test to be applied for the extinguishment of such rights. He concluded that the onus of establishing extinguishment rested upon the Crown, and then, citing **Lipan Apache Tribe v. U.S.** (1967) 180 Ct. Cl. 487 (Court of Claims) that:

> "... in the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish **all** of the [claimants'] rights' in their property, Indian title continues ..." (my emphasis)

Hall J. at p. 404 found:

> "... There is no such proof in the case at bar; no legislation to that effect."

Thus the judgment of Judson J. for himself, Martland and Ritchie JJ. allowed "inconsistency" between the claimed Indian rights and the expression of sovereign intent to be sufficient. They did not insist upon "clear and plain" language. For example, Judson J. found:

> "... the establishment of the railway belt under the Terms of Union is inconsistent with the recognition and continued existence of Indian title."

On the other hand, Hall J. for himself, Spence and Laskin JJ. found that the Sovereign's intention to extinguish must be made "clear and plain," and I have already mentioned his other comment about a requirement for either surrender or express legislation.

In **Canadian Pacific Limited v. Paul,** (1988) 2 S.C.R. 654, the Supreme Court of Canada seems to accept the proposition that a grant of a fee simple interest in land without mention of aboriginal rights would extinguish those rights, and that grants of lesser interests, such as a right of way, might not extinguish those rights but would nevertheless create a valid interest.

On the question of express statutory language I note the recent finding of Cory J., speaking for the majority in **Horseman v. the Queen,** (1990) 1 S.C.R. that:

> "... the onus of proving either **express or implicit** extinguishment lies upon the Crown." (my emphasis)

This question of extinguishment was considered again in a unanimous judgement of the Supreme Court of Canada in **Sparrow** which is the most recent authoritative statement on the question. At p. 1109 the Court recognized the power of the Crown to extinguish aboriginal rights. Speaking of tidal fishing the Court said:

> "There is nothing in the **Fisheries Act** or its detailed regulation that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual basis rather than a communal basis in no way shows a clear intention to extinguish. These permits were merely a way of controlling the fisheries, not defining underlying rights."

I conclude from this passage that the aboriginal right to fish for food would indeed be extinguished if the legislation showed a clear and plain intention to do so.

At the same page, the Court settled the test for extinguishment when it said:

> "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

It is significant, in my judgment, that the Court made this pronouncement regarding the test for extinguishment in the context of a discussion of **Calder,** which was concerned with the colonial period, and also that the Court did not include express statutory language as a part of its test. I therefore conclude that express statutory language is not a requirement for extinguishment.

The unanimous decision of all the judges (in **Sparrow**) so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific, isolated intention on the part of the historical actors, but rather to the consequences they intended. In other words, the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished.

There are two further reasons why I have reached the conclusion just expressed. First, the governing intention is that of the Crown in the 1850's and 1860's. It surely cannot be the intention of Her Majesty that is relevant, but rather that of her Ministers, Governors, and other officers, in short, an amalgam of thought, belief, planning and intention on the part of a number of officials who may all have had different knowledge, understanding and priorities. Intention, in this context, must be a matter of implication.

Secondly, the colonial period lasted for nearly 13 years, from 1858 to 1871. Those were busy times in the Colony and it would be unrealistic to think that this question of extinguishment should be focused narrowly upon single moments or isolated events.

For example, the last of the **Calder XIII,** (Ex. 1186, Tab 80) is dated June 1st, 1870, near the end of the colonial period. It is entitled **An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia.** It repeals, consolidates and re-enacts most of the earlier **Calder** enactments, and it is a comprehensive restatement of the land law of the colony.

Prior to the enactment of this Ordinance, the Attorney General wrote to the Governor, on April 27, 1870, for his information, explaining this new measure in which it was described as "... one uniform or rather general Crown land system over the entire Colony." The Attorney explained that there were different systems in force on the Mainland and on the Island, and it was explained, in great detail, how these matters were to be managed in a uniform system. One cannot read this report, (Ex. 1186, Tab 81), which contains no mention of Indians except in the prohibition against pre-emption, without concluding that there was indeed an intention to manage Crown land throughout the colony by a system that was inconsistent with continuing aboriginal rights.

In closing his Report, the Attorney General said:

> "The vital importance of the subject — the necessity of having one system of land laws for the Colony, after the Country has suffered for so many years from the loose diversity, discordant, offtimes antagonistic legislation that has taken place in different sections of the Colony before Union on the subject — the anxious care which has been

> bestowed upon the measure — to introduce no innovation or alteration which experience has not justified, compel the expression of an earnest hope that the Ordinance in its present shape may ere long receive that confirmation at the hands of her Majesty which will establish it as a permanent consolidated law for the regulation and settlement of the Crown Lands of British Columbia."

The Ordinance provides in s. III:

> "From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any Male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement), not exceeding Three Hundred and Twenty Acres in extent in that portion of the Colony situated to the Northward and Eastward of the Cascade or Coast Range of Mountains, and One Hundred and Sixty Acres in extent in the rest of the Colony. Provided that such rights of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to which as shall have obtained the governor's special permission in writing to that effect."

This was not an entirely new provision as similar but less detailed provisions for pre-emption, but with different acreages, had been enacted as early as 1859. Also, and as mentioned earlier, the prohibition against aboriginal pre-emption was first enacted in 1866. This was, however, a comprehensive land ordinance which, when it came into force, confirmed again that a separate system of land interests could not stand alongside this one in any part of the colony.

This 1870 Ordinance comprised 55 sections, and made provision not just for a comprehensive system of pre-emption, but also for leases for pastoral, hay and timber lands, actions for ejectment (by jury trial if requested), appeals, Crown reserves and surveys, water privileges, Free Miners licenses, Crown Grants "for the encouragement of Immigration", and other matters.

On May 11, 1870 the Attorney General wrote a very long report to the Governor (Ex. 1189, Tab 81) explaining the operation not just of this Ordinance, but also two other Ordinances passed by the Legislative Council that year entitled **"An Ordinance to assimilate the Law relating to the Transfer of Real Estate and to provide for the Registration of Titles to Land throughout the Colony of British Columbia"** and **"The Crown Grants Ordinance, 1870.** I mention these other 2 measures, even though they have not been accorded **"Calder"** status, because they compliment the 1870 Land Ordinance, and because the description given to them by the Attorney General is a useful description of the complete land system of the colony which again does not mention Indians. It is so thorough and comprehensive that it illustrates the pervasive intrusion of the Crown into the land law of the Colony.

Also, notice of Royal approval for these three measures was given in one communication from the Colonial Secretary, Lord Kimberley on Sept. 5, 1870 whose letter (Ex. 1186, Tab 85), shows they were carefully considered in London, and a suggestion was made that the Land Registration statute be amended by adding provisions for compensating parties wrongfully deprived of land from erroneous registration.

I think I should mention that I am not presently satisfied that each of the **Calder XIII** were all enacted by the Imperial Parliament, as I first thought. I believe most of them were, and there was no challenge to this in counsel's arguments, but I am not sure "Her Majesty's gracious confirmation and Allowance," as for the 1870 Land Ordinance necessarily indicates Parliamentary enactment. Confirmation and Allowance may be just a diplomatic way of confirming the approval of the Colonial Office, and its Secretary, but in a colonial milieu it adds credibility to the formal Proclamation of the Ordinance in the colony which appears in Ex. 1186, Tab 86, dated October 20, 1870.

Thus, in my judgment, intention sufficient to establish extinguishment must be examined broadly and need not be confined to a specific act or decision at a particular moment in colonial history. Instead, intention may more properly be discerned from a course of conduct over the whole of the colonial period.

I conclude that an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication. An obvious example would be the grant of a fee simple interest in land to a third party, or the grant of a lease, license, permit or other tenure inconsistent with continued aboriginal use. I shall consider this question again in a moment when I come to discuss extinguishment in relation to aboriginal rights.

The unanimous judicial decision of all the judges (in **Sparrow**) so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific or precise state of mind on the part of the historical actors, but rather to the consequences they intended for their actions. In other words, the question is not did the Crown through its officers specifically address the question of aboriginal rights, but rather did they clearly and plainly intend to create a legal regime from which is necessary to infer that aboriginal interests were in fact extinguished.

As the plaintiffs have advanced three separate classes of aboriginal claims, ownership, jurisdiction and aboriginal rights, I shall deal with extinguishment in relation to each of them.

## 2. Extinguishment of Aboriginal Rights of Jurisdiction and Ownership

### (a) Aboriginal Jurisdiction

I discussed this claim in Part 14 of this judgment and I concluded that aboriginal sovereignty did not survive the assertion of British sovereignty. I do not find it necessary to consider or decide whether the establishment of the Colony of British Columbia, for example, should be classified as a displacement of one sovereignty by a different one which the law recognizes, or whether the legal arrangements which were put in place during the colonial period amounted to an extinguishment of the earlier sovereignty.

I tend to think the former more correctly describes the historical reality, but if I am wrong in that regard, then it would be my judgment that the Crown clearly and plainly intended, in the sense I have mentioned, to extinguish any aboriginal jurisdiction or sovereignty which survived the assertion of British sovereignty. This, of course, was accomplished by the governmental arrangements the Crown put in place during the colonial period which were clearly intended to apply throughout the colony and to bind everyone who lived there. It is inconceivable in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with power to legislate, took title to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown.

In addition, in my view, the enactment of the **British North America Act, 1867** and adherence to it by the Colony of British Columbia in 1871, which was accomplished by

Imperial, Canadian and Colonial legislation confirmed the establishment of a federal nation with all legislative powers divided only between Canada and the province. This also clearly and plainly extinguished any residual aboriginal legislative or other jurisdiction, if any, which might have existed in the colonial period.

### (b) Aboriginal Ownership of Land

If I have erred in the conclusion I have already stated about aboriginal ownership, and if such an interest, or anything equivalent to it (additional to aboriginal rights), survived the assertion of British sovereignty then I must deal with that question at this time. My judgment is that any aboriginal interests in land that survived sovereignty were included within the rubric of aboriginal rights which I shall consider in a moment. As I understand the authorities, there is no jurisprudence binding on me which suggests the aboriginal interests of the plaintiffs' ancestors after the assertion of sovereignty constituted anything more than a user burden on the underlying title of the Crown.

If that is not so, I find the evidence establishes beyond question that the Crown, in the colonial period, clearly and plainly intended to, and did, extinguish any aboriginal right of ownership which existed in the colony. I say this because the colonial legislation so clearly appropriated all the land of the colony to the Crown and made provision for its alienation firstly on the authority of the Governor according to English law and subsequently pursuant to legislation. That, in my judgment, is completely inconsistent with any continuing aboriginal ownership interest.

As to intention, the dispatches passing between the Governor and the Colonial Secretaries in London, and legislative action taken, make it clear and plain first that the colony was to be thrown open for settlement; secondly that all the land of the colony belonged to the Crown in fee, and thirdly that only a grant from the Crown could create an ownership or proprietary land interest in the colony.

I cannot imagine a any clearer statement of intention than the Proclamation dated February 14, 1959, **(Calder II, Ex. 1185-10)**, in which it was declared, in s. 1:

> "1. All the lands in British Columbia, and all the Mines and Mineral therein, belong to the Crown in fee."

After 1858 the Crown embarked upon numerous legislative arrangements and participated in innumerable transactions relating to the land of the province which clearly and plainly exclude any possibility of any other ownership regime. In fact, **Calders III and XIII** enacted in 1860 and 1870 respectively were comprehensive statements of the intention of the colonial Crown completely to control both the ownership and use of all the land in the colony. As I have said, the grant of fee simple or lesser interests are, by themselves, the clearest and plainest possible expressions of an intention to extinguish any other ownership interest, and there are many other examples.

To put it in a nutshell, I find that legislation passed in the colony and by the Imperial Parliament that all the land in the colony belonged to the Crown in fee, apart altogether from many other enactments, extinguished any possible right of ownership on the part of the Indians.

The question of whether the Crown's ownership was burdened with aboriginal rights is, of course, a separate question which I shall now turn to consider.

### 3. Extinguishment of Aboriginal Rights

After the Queen's Ministers clearly expressed their intention to create a new colony on the Mainland, the Imperial Parliament, by the statute dated Aug. 2nd, 1858, established the Colony of British Columbia and authorized the Crown to appoint a Governor:

> "... to make provision for the administration of justice [therein] and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein; ..."

Then the Crown appointed James Douglas as Governor. There can be no doubt about his intention or that of his Imperial masters. On July 1, 1858 Lord Lytton wrote to Douglas:

> "... All claims and interests must be subordinated to that policy which is to be found in peopling and opening up of the new country with the intention of consolidating it as an integral and important part of the British Empire."

In reply, on Oct. 12, 1858, Douglas wrote:

> "Having just ascertained, from your Dispatch of the 1st of July last, that it was the wish of Her Majesties Government to colonize the country and develop its resources, I propose ..."

In reference to **Calder III,** the Governor on January 12, 1860 said:

> "The object of the measure is solely to encourage and induce the settlement of the country: occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition ..."
>
> The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, **Indian Settlements ...,** and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance to him, of being allowed to choose for himself and enter at once into possession of land without expense or delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.
>
> Other good effects are expected to result from the operation of the Act; there is, for example, every reason to believe that it will lead to the more rapid colonization of the country, and to greater economy in its survey, which can be effected hereafter, when roads are made, at a much smaller cost for travelling and conveyance than at the present time." (My emphasis). (Ex. 1187-13).

There are, in addition, innumerable other references to the clear and plain intention of the Crown, represented by its Ministers and other officials, to settle the colony.

Immediately upon his appointment, Governor Douglas proclaimed the laws of England to be in force in the colony. He also issued a Proclamation (which is the way he legislated), authorizing the Governor of the colony from time to time to grant to any person any land belonging to the Crown. This is the scheme that was implemented in **Calder I,** which was enhanced and refined in the subsequent colonial legislation most of which was duly re-enacted by the Imperial Parliament. This policy was supplemented by many other statutory instruments passed during colonial times.

The Crown also proceeded to have surveys completed and land sales were undertaken. The Crown also embarked upon the development of the province in many other ways besides straight-forward grants of land, some of which have already been described.

The process leading to the enactment of **Calder III** is particularly instructive. It will be recalled that a question had been raised by Capt. Clark about "aboriginal title" and Begbie J. had expressed an opinion that it had not been extinguished. I am satisfied he was referring to treaty extinguishment, and he was not addressing himself to the question I am considering. This opinion and all other material was sent forward to London where it was considered for some months and the legislation was then enacted. The province summarizes the chronology in its summary of argument as follows:

> "a. The sole purpose of the Proclamation was to provide a means whereby title to land could be vested in a Crown grantee.
>
> b. The Proclamation was under consideration by the Colonial Office from March 5, 1860 until December 6, 1860 when the Queen's sanction was recorded in a dispatch of that date.
>
> c. The question of aboriginal title had been expressly raised in October 1859 by Captain Clarke in his elaborate scheme for the disposition of Crown lands in British Columbia on the assumption that Indian title "... had been extinguished or separate provision made for them ..."
>
> d. The scheme was forwarded to Douglas for comment on January 7, 1860 but, more importantly, he was later told that approval of his land proclamation would be withheld until his comments were received. This was done in May, 1860.
>
> e. Douglas' comments were forwarded in August 1860 (Ex. 1142-29) and under separate cover of the same date he sent those of Begbie, J., who expressly denied Clarke's assumption that Indian title had been extinguished and that "... Separate provision must be made for it, and soon ..."
>
> f. These dispatches were received October 8, 1860. The Emigration Board saw nothing in Begbie J.'s paper to overrule the recommendations of Douglas — that the Proclamation (**Calder III**) be allowed to operate ..."

There is, as described in Part 11, a great deal of evidence demonstrating that the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests. The Crown must be taken to have known that it could not free the land from this burden without extinguishing these aboriginal interests. This probably did not trouble the Crown because it also intended to allot generous reserves, and to allow the Indians to use vacant lands. The primary intention however, was obviously to settle the colony by granting unburdened interests to settlers.

In view of this history, I respectfully agree with the views of the seven judges who reached the same conclusion in **Calder.** I find the constitutional and legal arrangements put in place in the colony were totally inconsistent with aboriginal rights the continuation of which would have prevented the Crown from the settlement and development of the colony. As the intention of the Crown must be ascertained objectively from a consideration of all the circumstances in their historical setting, I find the Crown clearly and plainly intended to, and did, extinguish aboriginal rights in the colony by the arrangements it made for the development of the colony including provision for conveying titles and tenures unencumbered by any aboriginal rights and by the other arrangements it made for Indians.

I test this conclusion by reference to a hypothetical parcel of non-reserve land which, before the creation of the colony, had been used for a long time for aboriginal sustenance. After the enactment of even **Calder I,** and more so after all the **Calder** legislation, such parcel was subject to Crown grant, pre-emption or other disposition to third parties. Upon such disposition this parcel became the property of a stranger under circumstances which exclude the continuation of aboriginal use.

On the authorities I have mentioned, I see no answer to the conclusion that the Crown in colonial times clearly and plainly intended not to recognize, and to extinguish, aboriginal rights which might otherwise have prevented it from transferring title to its settlers. This, of course, is completely consistent with the reality already mentioned that (except for village sites), aboriginal rights existed only at the pleasure of the Crown. I have no doubt the Crown's grantees during colonial times obtained title to or interests in land obtained from or through the Crown unburdened by aboriginal rights.

I have also considered whether the intention of the Crown to extinguish aboriginal rights could be limited just to the lands it actually transferred to third parties, but I reject that as did all of the seven judges who reached the same conclusion in **Calder.** I find that was not the intention of the Crown. This is shown in many different ways, including the fact that the Crown took title to all the land in the Colony and enacted comprehensive land law legislation for that very purpose. The Crown's intention was clearly ongoing with Indian interests looked after by reserves and the right to use vacant land and all the rest of the colony thrown open for settlement. The colonial legislation must be taken to have extinguished aboriginal rights as they existed in the colony at the date of sovereignty except for Indian reserves.

I pause to say that I do not intend the foregoing to extend beyond aboriginal rights to land. Specifically, I do not intend it to apply to fishing as it was not suggested in argument that I should pronounce in any way on fishing rights and, of course, no claim was made in this case against the federal Crown.

It follows, in my judgment, that when the Colony united with Canada in 1871, the province obtained all of the Crown lands of the colony under s. 109 of the **British North America Act, 1867,** free of any Trust or Interests of Indians. The province was thereafter able to transfer title or other tenures to Crown grantees.

In addition to extinguishing aboriginal rights, however, the Crown also intended that the Indians would be furnished with "generous" reserves, and legislative arrangements were made for that purpose. I have already expressed my views on that process.

### 4. Fiduciary Duties

During colonial times, and subsequently, the Crown also agreed, for the time being, that the Indians and every other person in the colony could use or continue to use vacant Crown lands for lawful purposes. For example, on February 5, 1859 Governor Douglas informed the House of Assembly that the Indians:

> "...were to be protected in their original right of fishing On the coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown lands; and they were also to be secured in the enjoyment of their village sites and cultivated fields.

In a dispatch dated October 9, 1860 Governor Douglas wrote:

> "... I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; **and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony;"** (my emphasis)

This promise was often repeated both during colonial and provincial times. This permitted use, apart from reserves, was not limited to specific areas for specific Indians, nor were any priorities established. Thus Indians from one part of the colony were entitled to use vacant land in any other part of the colony.

I have considered whether this permitted use should be construed as an amended aboriginal right. I have concluded that this would not be proper: firstly, that is not how aboriginal rights are created; secondly, the "permission" was extended to both Indians and non-Indians which is not an aboriginal right; and thirdly, the lack of identified or specific lands is inconsistent with aboriginal rights. In this last-mentioned connection, I have held that aboriginal rights are not necessarily exclusive where more than one Indian people have used the same land, but aboriginal rights attach only to the specific lands which aboriginal ancestors have used for an indefinite long time.

Rather, I find that this kind of permission may more closely be related to the arrangements included in the Douglas treaties, one of which I quoted in Part 11. Included in some of those treaties was the assurance given to the Indians:

> "... it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. ..."

I do not recall any argument on the construction of this language, but it is clear from the historical context that the permitted use was limited to the time the particular land remained vacant. Such was the conclusion expressed by Lambert J.A. in **R. v Bartleman,** (1984) 55 B.C.L.R. 78 @ p. 97. (B.C.C.A.) with which I respectfully agree.

Doing the best I can to characterize the agreement or permission of the Crown to its aboriginal peoples, I conclude that it amounted at least to a promise that vacant lands could be used for aboriginal purposes, subject to the general law, so long as such lands were not dedicated to an adverse purpose. This was a valuable right because it was never the intention of the Crown that the Indians would be required to live or stay on their reserves.

Attorney-General Walkem said as much about the colonial period in his 1875 Report:

> "... Under [Colonial] policy the Natives were invited and encouraged to mingle with and live amongst the white population ..." (Ex. 1182, p.2)

As I understand the history, the Indians of the colony and province have indeed used vacant Crown land and are continuing to do so. This leaves me with the question whether the Crown's promise has any legal effect at this time. While no specific argument was addressed to this question at trial, the arguments of counsel were so comprehensive about duties and obligations that I consider it open to me to consider. Certainly I was furnished with all the authorities I require for this purpose, and counsels' excellent submissions dealt extensively with all the principles upon which I propose to rely. As in other matters mentioned earlier, I shall leave it to counsel to consider whether an amendment is required.

In my judgment, s. 35 of the **Constitution Act, 1982,** does not apply to the question I am now considering because it only recognizes and affirms aboriginal rights which I have excluded in this case.

The relationship between the Crown and Indians is, however, an emerging area of law which is only now starting to be explored, and several recent cases have established that special duties and obligations arise out such relationships. I need only mention that, prior to extinguishment, the Indians of the territory had aboriginal rights to parts of the territory. Until extinguished, these were legal rights which could have been enforced in the courts although that might not have been recognized at that time.

Prior to extinguishment the Crown had already recognized its comprehensive obligation regarding the welfare of the Indians. The dispatches include many such references. When the Crown extinguished these legal rights it made the promise I have already described. How should the law classify that promise?

**Guerin** is a difficult case to apply in the circumstances of this case because its facts were so completely different. As already mentioned, it was concerned with a surrender under the **Indian Act,** and the duty found in that case arose from a surrendered interest in a reserve. Nevertheless, the judgments provide useful instruction.

Wilson J., at p. 348-49 in **Guerin,** found that s. 18 of the **Indian Act** does not expressly impose a fiduciary obligation on the Crown, but she thought the section **recognized** the existence of such a [fiduciary] obligation which had its "... roots in the aboriginal title of Canada's Indians ..."

Dickson J. at p. 376 expressed the same view about the root of the Crown's duty, but he went on to describe the nature of the obligation owed by the Crown. At p. 375, after finding that the Crown's obligation could not be regarded as a trust he said:

> "... That does not, however, mean that the Crown owes no enforceable duty to the Indians in the way in which it deals with Indian land.

In **Guerin,** Indian interests in the subject land were not extinguished. Instead some reserve land was surrendered for the intended benefit of the Indians. In this case, aboriginal rights were extinguished for the purpose of becoming available for settlers, and a different remedy is required, perhaps by the same route.

Then, on p. 376 Dickson J. went on to confirm that the statutory scheme [of the **Indian Act**] "... places upon the Crown an equitable obligation, enforceable by the courts to deal with the land for the benefit of the Indians." He also said this obligation did not amount to a trust, but rather a fiduciary duty.

He then adverted to the Royal Proclamation which he said is recognized in the surrender provisions of the **Indian Act** and he added, at p. 376:

> "The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."

Then, after discussing aboriginal rights generally, based largely upon the assumed application of the Royal Proclamation, Dickson J. said at p. 385"

> "Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship ... The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. The Crown's obligation to the

> Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this **sui generis** relationship, it is not improper to regard the Crown as a fiduciary. . .
>
> ". . . When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indian's behalf.

It is often dangerous to apply principles found in one case to the facts of a different case, but there are similarities between **Guerin** and this case. In both cases the Indians had a legal right, both with their roots in aboriginal rights. In both cases they lost that right, in **Guerin** by surrender, and in this case by extinguishment. In the former, the Court imposed a fiduciary duty upon the Crown; in this case the Crown promised the Indians they could use the land of the colony and province for aboriginal purposes until it was required for other purposes. Keeping in mind the general obligation of the Crown towards Indians, and that "the categories of fiduciary, like those of negligence should not be considered closed," (**Guerin,** p. 384), it is my view that a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as a basis for a fiduciary obligation.

While the document in question in **Sioui** was found to be a treaty, it was hardly more than a permit in writing to conduct aboriginal activities and it was enforced with qualifications which recognized competing Crown interests.

In **Sparrow,** the Court at p. 1108 referred to **Guerin,** and **R. v. Taylor and Williams,** and said:

> ". . . the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

The foregoing passage from **Sparrow** must be limited by its context as the Court was considering an alleged interference with an unextinguished, fairly obvious existing aboriginal right. Further, this statement cannot be used to impose a general comprehensive fiduciary duty in every situation. In a case such as this, however, where a general obligation has been recognized, a promise made and acted upon for well over 100 years is sufficient to support an enforceable, fiduciary or trust-like obligation upon the Crown.

The Crown's obligation, in my judgment, is to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land.

As aboriginal rights were capable of modernization, so should the obligations and benefits of this duty be flexible to meet changing conditions. Land that is conveyed away, but later returned to the Crown, becomes again usable by Indians. Crown lands that are leased or licensed, such as for clearcut logging to use an extreme example, become usable again after logging operations are completed or abandoned.

I have also considered whether, by analogy to **Sparrow,** I should mandate a justification process in order to provide a formula for the settlement of disputes arising out of the foregoing. I have decided I should not, both for the reasons which follow and because the fiduciary duty the Crown assumed upon the extinguishment of aboriginal rights is not a constitutionally recognized or affirmed right and is therefore subject to the general law of the province.

**Sparrow** was a case where the constitutionality of a specific net length regulation was challenged in the context of a closely regulated industry. The issues were enviably narrow ones: whether food fishing was an aboriginal right (the Court of Appeal and Supreme Court of Canada found that it was), and whether, in the federal Crown's regulation of this annual fishery, a restriction of net length to 25 fathoms interfered unconstitutionally with aboriginal rights (regular gill nets are 200 fathoms).

The Court found it could not answer the second question because of a lack of evidence and a new trial was ordered. I have already mentioned that the justification process mandated by the Court for the reconciliation of the Crown's power of regulation with the aboriginal right required, amongst other things, legitimate Crown objectives, minimal interference with aboriginal rights, consultation, and priorities for Indians in the fishery subject to conservation measures. It must be remembered, however, that the **Fisheries Act** and regulations already recognized Indian priorities.

In this case I am dealing with a situation where the province, in the ordinary discharge of its s. 92 powers, has been lawfully and necessarily making Crown grants of land and issuing licenses etc., and therefore diminishing user opportunities, on an ongoing basis since Confederation. If **Sparrow** is the model then reconciliation in this case must be more of a two way street than it was in that case.

The new trial Court (in **Sparrow**), will have to determine whether this particular net length survives the particular justification process described in the judgment. If it does, subject to other defences, Mr. Sparrow will presumably be convicted. If it does not, then Mr. Sparrow will be acquitted and the Crown will either prescribe a different net length or adopt a different form of regulation, or abandon regulation entirely. Having regard to the other Indian and non-Indian interests in this fishery, it is unlikely all such regulation will be abandoned.

Whatever net length the Crown decides upon (and presumably all its other regulations), can be challenged under the justification process, possibly serially, and one or more Courts may have to measure the constitutionality of successive net length and other regulations against the specific justification process and possibly also measure the constitutionality of the priorities fixed for each aboriginal group engaged in the fishery.

This is an awkward, possibly endless, process but one which should eventually provide an answer and fishing will continue under current regulations while their constitutionality is being debated because, with good management, the fish will return each year. I doubt if the same may be said for multiple land use in the territory where there are so many regulated and unregulated activities and the growing cycle is so much longer even though usuable regeneration is usually measured in years rather than decades. I do not think all these activities can be measured and remeasured by a specific test against relatively limited hunting, fishing, berry picking and other aboriginal gathering activities at countless locations at all times of the year.

Considering the many opportunities which exist for conflict in the territory, it is not possible to do much more than state the principles which should govern the Crown's duty. What follows is intended to assist the parties to understand the kind of reconciliation I believe the law expects. I shall not presume to describe my efforts in this connection as a justification process because I cannot be nearly as specific as was attempted in **Sparrow.** What follows would be the framework for a justification and reconciliation process I would specify if I found the plaintiffs had continuing aboriginal interests.

As counsel will explain to the parties, the Court speaks only through a formal written Order or Judgment which should leave no doubt about its meaning. It is not possible to define a complex and multi-dimensional relationship either in Reasons for Judgment or in a formal Judgment of the Court, or to impose such a relationship upon the parties. Nor is it generally a judicial function to specify the terms of an ongoing complex relationship. After the Court has identified the principles, the parties must honourably work out their differences as best they can.

In considering what the law expects in the circumstances of this case, it is necessary to remember what has really happened in the territory and what is happening now. I do not pretend that I have precisely captured all the social and economic dynamics which are operating within the Gitksan, Wet'suwet'en and non-Indian communities, nor do I expect that every observer would necessarily reach the same conclusions as I do. I also recognize that a trial may not always be the best way to investigate these matters, but the evidence is the only information I have.

In British Columbia the responsibility of the Crown has always been a difficult one to discharge with actual conflicts between settlers and Indians not as obvious as in other parts of North America even though the potential for conflict was always present because of limited agricultural land. Compared with other jurisdictions where Indians were confined to reserves, or their rights were purchased for a pittance, British Columbia land policy in the territory did not usually interfere seriously with Indian land use. Settlement, which did not begin in the territory until the beginning of this century, was initially confined to the Bulkley and Kispiox valleys where land cultivation had not been pursued vigorously by many Indians. There were no large railway land grants in the territory, and even the pre-emption of most agricultural land did not impinge seriously upon many aspects of aboriginal life.

Yet there were some dispossessions and almost from the beginning of the colony, and from the time of settlement in the territory, it must have been obvious that the Indian population was falling into disadvantage when compared with the then white non-Indian community. The condition of the Indians in the territory throughout the entire history of their association with the European settlers has been an unhappy one with alcohol abuse, disease, infant mortality, poverty, and a lack of many of the benefits of civilization, particularly health, education and economic opportunities, and the ubiquitous dependence being usually the most serious social problems.

Indian misfortune, or at least disadvantage comparable to present day conditions, and probably much worse, was described by early visitors to the territory such as Brown and Ogden in the 1820's and 30's and by Loring in the 1890's. Disease and other misfortune arrived in the territory 70 years or so before the settlers or the railway.

The evidence suggests the land was seldom able to provide the Indians with anything more than a primitive existence. There was no massive physical interference with Indian access to non-reserve land sustenance in the territory, and there was no forced or encouraged migration away from the land towards the villages. Migration away from the land has been an Indian initiative and it started before there was any substantial settlement in the territory.

The introduction of alcohol, disastrous epidemics and limited economic opportunities did not result from a lack of access to land. Loring's reports, starting about 1890 before settlement began, describe much hardship when the Indians were still living "on the land" even though by that time they had access to many European trade goods which must have made life to some degree more bearable. The acquisition of firearms, for example, made hunting a far less random and hazardous exercise than it had always been.

This is not to say that European influences upon Indian life were not pervasive, but when I consider the effects of disease, alcohol and other social insults upon the Indian community, it is apparent that interference with aboriginal uses of land, except for actual dispossessions, was not a principal cause of Indian misfortune.

Further, I believe the Indians of the territory are probably much more united and cohesive as peoples, and they are more culturally sensitive to their aboriginal birthright than they were when life was so harsh and communication so difficult. I cannot find lack of access to aboriginal land has seriously harmed the identity of these peoples.

There is a further dimension to this question, however, which must also be considered. I refer to the obvious spiritual connection some Indians have with the land. I accept this as a real concern to the plaintiffs worthy of as much consideration as actual sustenance use. At the same time, this important feature cannot completely be separated from sustenance because the products of the land and waters of the territory are an integral part of that spiritual attachment.

Except in rare cases, there should be no difficulty obtaining sufficient fish, game and other products from most areas of the territory not just for desired levels of sustenance but also for spiritual purposes. In this respect I pause to mention that the salmon of the great rivers pass right alongside the principal villages and one need not travel far from the villages to reach wilderness areas where game can usually be taken. There is much wood left in the territory and it can be obtained far more easily with chain saws, snowmobiles and 4 x 4's than in earlier days. Anyone can now travel with much greater ease to whatever parts of the territory he or she may wish for the purpose of gathering what is required for sustenance or ceremonial purposes.

I appreciate that it may be difficult or impossible to obtain game and other resources at every exact place from where they were formerly obtained, particularly in built-up areas such as New Hazelton, Smithers, Houston and Burns Lake which are occupied principally by non-Indians and which were not prominently the sites of native villages. This is unfortunate, but the same applies, I am sure, near the Indian's own villages particularly as Indian populations increase. Fortunately, it is a very large country with enormous wilderness areas.

What has been lost, perhaps, is the spiritual connection not with land, but with control or belief in ownership of land. I say this because access to land has usually been available to the Indians, and much of it still is, or will be again. For this purpose, the loss of ownership or belief in ownership includes the spiritual connection these peoples have with the land. This loss occurred at the time of sovereignty. For the reasons I have already given, it is not a matter for which the Court can provide a remedy. It is, however, a matter the Crown should take into consideration in deciding how it will proceed with the development of the province and its resources.

I recognize that some Indians greatly regret that they no longer live off the land. Most of them, however, particularly the young people, no longer wish to do that. When the price of furs dropped in 1950 those still on the land moved to the villages. Most Indian sustenance and ceremonial requirements are almost as conveniently available as they ever were. In addition, they have access to a great many advantages which were not formerly available to them.

The plaintiffs are also troubled because they have not progressed equally with some of the "newcomers," and because they have not been able, for many real and intangible reasons, to share the opportunities they think they should have to the commercial use of the land and to the prosperity they think should accrue to them from the land they truly believe is their own. There is evidence which satisfies me the plaintiffs, if completely successful in this action, would seek to exploit the resources of the territory for their own account. They say they would do this better than it is presently being done but I cannot express any opinion on that question. There is a relentless correlation between economics and environmental sensitivity and one must have all the factors of the equation before any opinion can be expressed on that difficult question. It was not an easy decision, I am sure, when the Moricetown Band was advised to clear cut its timber lands in order to provide economic employment for its members.

These understandable aspirations to control the development of the territory do not fall within the rubric of the plaintiffs' continuing use of the territory as might have been the case if they had succeeded on the issues of ownership and jurisdiction. At the same time, the Indians must realize the importance of creating public wealth from the territory as they, like so many members of the non-Indian community, are heavily dependent upon public funding for every day sustenance.

Having stated some of the factors I would have included in a justification process, I propose to state some propositions for the assistance of the parties considering their positions on the fiduciary duty I have identified.

First, the federal and provincial Crown, each in its own jurisdiction, always keeping the honour of the Crown in mind, must be free to direct the development of the province and the management of its resources and economy in the best interests of both the Indians and non-Indians of the territory and of the province. I reach this conclusion because firstly, it states no more than I have already established as a principle that the province has the legal right to alienate interests in the territory; and secondly because even in the case of a continuing aboriginal right the Court in **Sparrow** specifically stated that the objective of the justification process:

> "... is not to undermine [the Crown's] ability and responsibility with respect to creating and administering overall conservation and **management** plans regarding the salmon fishery." (my emphasis)

It would seriously undermine the ability of the Crown to manage the resources of the territory if, subject to what follows, it did not have the ongoing right to develop or alienate the land and resources of the province.

Secondly, the Ministers of the province and their officers should always keep the aboriginal interests of the plaintiffs very much in mind in deciding what legislation to recommend to the legislature, and what policies to implement in the territory. There should be reasonable consultation so that the plaintiffs will know the extent to which their use might be terminated or disturbed. A right of consultation does not include a veto, or any requirement for consent or agreement, although such is much to be desired.

Thirdly, the province should make genuine efforts to ensure that aboriginal sustenance from and cultural activities upon unoccupied Crown land are not impaired arbitrarily or unduly. If that should occur from time to time then suitable alternative arrangements should be made. It must be assumed there will often be interference because the most likely tension will be between forestry operations and sustenance rights. Most of such interference should not be permanent in any particular area of the territory and these competing interests must be reconciled.

I do not suggest these are the only tensions which will arise for there are also conservation and environmental questions. Those are matters in which the plaintiffs along with the rest of the public have a vital interest. The plaintiffs' conservation and environmental concerns are not sufficiently distinct from their subsistence activities to make it necessary for me to deal with them separately. I wish unequivocally to state that I do not regard general conservation and environmental matters to be in issue in this case, and I do not wish to be taken to be pronouncing upon them in any way.

Fourthly, whether any proposed or resulting interference offends unduly upon aboriginal activities and brings the honour of the Crown into question will in large measure depend upon the nature of the aboriginal activity sought to be protected and the extent it is ordinarily exercised; the reasonable alternatives available to all parties; the nature and extent of the interference; its duration; and a fair weighing of advantages and disadvantages both to the Crown representing all the citizens and to the Indians. While the Court in **Sparrow** gave the Crown a clear message that it must take aboriginal rights seriously, (which admonition, translated to user rights, should also be read into this judgment), the plaintiffs' aboriginal activities in the territory, which they have exercised only marginally for many years, will seldom be the only responsibility the Crown has to discharge.

In this connection, I must respectfully depart from what was said in **Sparrow** about the public interest. Food fishing for salmon is critical to aboriginal sustenance and in such a narrow area of activity the Court considered that the public interest was either too uncertain, or it was necessarily sublimated to the particular aboriginal interest the Court was defining. This case is quite different because of the multi-dimensional activities operating in the territory and their breadth, both in area, time and range of activities is so much greater than the operation of a seasonal, localized fishery.

Fifthly, notwithstanding what I have just said, I would expect the province to provide some sustenance priority to Indians in the use of vacant land to the extent permitted by The **Charter.** Perhaps it already does. This will become most important if shortages of game arise not just in specific areas, but in the area generally. If that should occur then Indians should have priority for such game and other sustenance items over non-Indians after the requirements of reasonable conservation have been satisfied. This is not to say the plaintiffs will always have priority over other Crown authorized activities in the territory. Those kinds of conflicts may well arise from time to time, and they must be resolved honourably and reasonably. A reasonable decision is usually an honourable decision.

Sixthly, while I would not purport to define what legal proceedings may be brought to challenge Crown activities authorized by provincial legislation, I am satisfied it would not have been the expectation of the Supreme Court of Canada, if it had dealt with this case, that Crown authorized activities in such a vast and almost empty territory would often give rise to legal proceedings.

In fact, unlike **Sparrow** which dealt only with a single issue in a regulated fishery, challenges regarding conflicts between Indian use and competing activities should be confined to issues which call the honour of the Crown into question with respect to the territory as a whole. Local operating decisions such as to log a block here, or build a road there, should surely not call for judicial intervention.

This is because it is not the law, or common sense, nor is it in the interest of the people of the province or of the plaintiffs that the development, business and economy of the province and its citizens should constantly be burdened by litigation or be injunctioned into abeyance by endless or successive legal proceedings. Proper planning and appropriate consultation with, or disclosure to, the plaintiffs or their advisors, and reasonable accommodations on all sides, should make the difficulties I have just mentioned unnecessary.

Because of all the foregoing, I do not think it will be wise for me to construct a justification process. In my judgment the range of potential competition is too vast for a pre-determined procedure. I believe the law relating to fiduciary duties is better able to resolve these questions than any specification I could devise. The operating word must be reconciliation rather than justification.

## 5. Conclusions

(1) In my judgment the plaintiffs' aboriginal interests in the territory were lawfully extinguished by the Crown during the colonial period.

(2) It follows that non-reserve Crown lands, titles and tenures granted by the Crown in the territory since the creation of the Colony of British Columbia in 1858 are unencumbered by any claim to aboriginal interests.

(3) The plaintiffs are entitled to a declaration that the Gitksan and Wet'suwet'en peoples are entitled, as against the Crown but subject to the general law, to use unoccupied, vacant Crown lands within the territory for aboriginal sustenance activities until it is required for an adverse purpose. I limit this declaration to the territory because that is the only land which is in issue in this action but I see no reason why it should not apply to the province generally.

# PART 16

## DAMAGES

The plaintiffs, hunting for much larger game, did not directly attack any specific provincial legislation or regulation affecting aboriginal interests in the territory. Instead they sought declarations of ownership and jurisdiction to which I have added ongoing aboriginal rights. If the plaintiffs had succeeded in obtaining such declarations on their first three heads of claim they would have contended they are entitled to damages for the consequences of all interference with the territory although that would not follow automatically as the province advanced other defences which would then have to be considered.

These broad issues were undoubtedly the ones the plaintiffs wished to have tried in this action, and I well understand why they advanced their claim in that way.

As the plaintiffs have failed on these issues, and as I have reached the opinion that the province has all along had the authority reasonably to terminate or diminish user rights in the territory, it follows that the plaintiffs' claims for communal damages must be dismissed.

Although this claim for damages is a communal claim, it has been brought by individuals and personal claims could be included although they are not specifically pleaded. I do not recall any individual claims other than general complaints about reduced hunting and fishing opportunities and some dispossessions in the early years of this century. The plaintiffs did not press these claims in argument and I understand the rights asserted against the Indians arose under what I must assume was valid Canadian or British Columbia legislation. I am satisfied the plaintiffs have not established any claims for damages in this action.

It is accordingly unnecessary to deal with the defences raised by the province under the **Crown Proceeding Act,** 1974, S.B.C. c. 24 (which would have precluded recovery for damages incurred prior to the effective date of that enactment on Aug. 1, 1974), or under the **Limitation Act,** 1979, B.S.B.C. c.236 (which would have precluded damages except perhaps those incurred within 2 years of the date of the Writ in 1984 of which there is no specific evidence.

Although it was not argued, I have considered whether any compensation should be payable to plaintiffs either for reduced reserves, or for interference with Indian use of vacant Crown land. With regard to the former, I am aware of many aboriginal complaints throughout the province about reductions in reserves, but no such claims were advanced in this case. Instead, I refer to the failure to allot larger reserves. Again, no such claims were pleaded, and no evidence or argument was directed to that question.

The evidence is that reserves were allotted and furnished by the province pursuant to its obligation under the 13th of the Terms of Union with Canada, and Canada has acknowledged that British Columbia has satisfied its obligations in that connection. Apart from that, there is no evidence that any particular reserve should have been allotted or increased in size, and no basis has been shown upon which I could make an award of damages.

I have already offered the comment that larger reserves should have been allotted, but I have also commented that the Indians did not always help their own cause. The evidence does not permit me to make an award in this matter. It is my view, as I have no jurisdiction to create reserves, that the plaintiffs' claims for larger reserves or compensation in their place is a matter for the Crown, and not for the Courts. There is no legal basis upon which I can assist the plaintiffs in this connection.

With regard to interference with aboriginal life, the evidence is similarly sparse. There were dispossessions, and interferences such as when beaver dams were destroyed in the Bulkley Valley, and there were other incidents. The evidence does not disclose, however, whether such interference was by the Crown or by private citizens, or under statutory authority, nor was any arbitrary interference as I have defined it established by evidence. Apart altogether from the strictly legal defences, there is insufficient evidence to conclude that the plaintiffs have established a cause of action for damages or compensation.

I am satisfied that it would not be proper to make any award of damages in this case and that claim is dismissed. Whether the plaintiffs should be compensated for any of the matters mentioned in the evidence is a matter for the Crown, not for the Court.

## PART 17

# THE LANDS SUBJECT TO ABORIGINAL RIGHTS AT THE DATE OF BRITISH SOVEREIGNTY

### 1. General

It is now necessary to delineate the areas within the territory which were subject to aboriginal rights at the date of British sovereignty and prior to extinguishment. This is necessary in case I am wrong in the conclusions I have expressed in Part 15 of this judgment.

### 2. The External Boundary

In their original Statement of Claim dated October 23, 1984, the plaintiffs alleged:

> "56. The Plaintiffs have owned and exercised jurisdiction over the lands described in Schedule "A" and set out on the map attached as Schedule "B" (hereinafter referred to as "the Territory").

Schedule "A" to the original Statement of claim was a 19 page single spaced metes and bounds description of the external boundary as the plaintiffs then believed it to be. The description of the territory was changed several times before and during the trial. The metes and bounds description was changed once or twice during the pre-trial period, but I do not believe it was changed with every subsequent alteration of the external boundary. I do not propose to comment further upon the metes and bounds description as nothing turns on it and the amended maps exhibited at trial more conveniently explain the subject matter of plaintiffs' para. 56. allegations.

Before I describe the various amendments to Schedule B, I should mention that prior to this action, the Gitksan-Carrier Tribal Council made a submission to the Honourable Hugh Faulkner, Minister of Indian Affairs, dated November 7, 1977, to which was attached a map showing the alleged external boundary of the lands they claimed including the lands alleged in this action to belong to the Kitwankool chiefs. This map is Ex. 113, and Ex. 646-1. It generally conforms to the later maps but is different in detail. For example, the south external boundary is north of Ootsa Lake and Tahtsa Reach.

Schedule "B" to the Statement of Claim was prepared from information collected by Mr. Neil B. Sterritt and others. On the basis of this information Mr. Marvin George, a qualified and competent cartographer, actually prepared the Schedule "B" map. It showed only the then alleged external boundary of the territory and it excluded the Kitwankool lands.

Schedule "B" was generally conformable to the outline of the 1977 map, except for many adjustments and the two boundaries hardly coincide except in the north-east and north-west. Substantially less land is claimed in the coast mountains of the south-west, and substantially more is claimed in the south and south-east. As mentioned, the 1977 boundary ran north of Ootsa Lake and Tahtsa Reach and it only included the west half of Francois Lake. The Schedule "B" boundary was at the height of land south of Ootsa Lake and included nearly all of Francois Lake. As will appear later, there are many inconsistencies in the plaintiff's territorial evidence. I would not have thought there would ever have been any doubt about the question of whether Wet'suwet'en lands included such prominent and enormous features as Ootsa and Francois Lakes.

Also, there was a substantial adjustment in the Bear Lake area which had been partly excluded from the 1977 territory but was included in Schedule "B." Bear Lake is another extremely prominent geographical feature.

Neither of these two maps purported to show internal boundaries.

On April 1, 1985, the plaintiffs amended Schedule "B" by producing a fresh map which generally conformed to the original Schedule "B" but with many minor adjustments. The most substantial difference was the inclusion of a large enclave claimed by Geel on the northern boundary which had been excluded in the earlier two maps. This change was satisfactorily explained on the basis that Geel was unable to get instructions from House members in Vancouver in time to join in the earlier claims. This map showed no internal boundaries.

There is another map dated October 17, 1985, which became Ex. 646-4 which showed some internal boundaries.

In 1986 Mr. Marvin George prepared a large map (Ex. 101, adapted from Ex. 100) which purported to show overlaps in the lands claimed by the plaintiffs and by the Carrier-Sekanni Tribal Council. This was for the purposes of an All Clans feast at Moricetown on April 6, 1986. The Wet'suwet'en chiefs relied upon this map as an accurate representation of their territories. It shows substantial overlap claims alleged on behalf of the Carrier-Sekanni, including much of the southern territory claimed by the Wet'suwet'en chiefs in this case as well as other disputed areas along the north-east boundary of the territory, particularly at Chapman and Bear Lakes, and further north.

During the pre-trial period the province delivered interrogatories to all or a great many plaintiffs requiring a description of the lands claimed by the plaintiff to whom the Interrogatory was delivered. Many of the plaintiffs answered such question under oath by reference to sketches marked "Draft," attached to their answers. Neil Sterritt testified that in 1987 he believed these interrogatory sketches accurately described internal boundaries.

Few, if any, of these sketch maps accorded closely to the evidence adduced by or on behalf of these plaintiffs at trial, and some were markedly different. The plaintiff's explanation was that these were preliminary drafts prepared before detailed research was completed.

In March, 1987 Mr. Sterritt caused a further map to be prepared which became Ex. 646-6 at the trial. It shows internal boundaries and, (a) substantially reduced land claims on the north boundary; (b) an addition in the Kwinageese area on the north-west boundary; and (c) a deletion at Chapman Lake apparently agreed upon at the All Clans Feast. Many of these internal boundaries were later amended. This map was not tendered as an amended Schedule B.

At the opening of the trial the plaintiffs tendered an amended Schedule "B" which became Ex. 681. It confirmed the changes shown on Ex. 647-6 just mentioned, and also deleted a large area, know as Nii Kyap's territory at the north-east corner of the territory. It also adjusted the central easterly boundary by adding a small area just north of the Chapman Lake deletion. The plaintiffs also produced a colour coded draft map of the individual territories claimed by the plaintiffs, which were later substantially changed. This map, originally designated as Ex. 5 for identification, became Ex. 646-8 in the plaintiff's collection of maps which were admitted into evidence at trial. Although the plaintiffs believed it accurately described their internal boundaries at the commencement of the trial, it was stated to be a draft and these internal boundaries underwent substantial revision as the trial progressed. The plaintiffs say it should be considered only as a draft.

Shortly after the commencement of the trial, when it became obvious that it would take almost forever for the plaintiffs to prove all their internal boundaries by oral testimony, although some witnesses had attempted to do so, the plaintiff's sensibly proposed that they would adduce most of their internal boundary evidence by what became known as Territorial Affidavits sworn by chiefs respecting their own territories or territories with which they were familiar. This was done and 53 of these affidavits were filed some of which sought to establish the boundaries of several individual territories. 30 of these deponents were cross-examined out of Court. Several more were cross-examined in Court. Finally, after the completion of their territorial affidavit project the plaintiffs filed Exs. 646-9A and 646-9B which purport to describe the final internal and external boundaries of the Gitksan and Wet'suwet'en chiefs respectively. The Statement of Claim was also amended to substitute these 2 maps for Schedule "B."

As the final external boundary is merely the result of all the internal boundaries, it is changed somewhat from the previous maps, the most significant change being the re-instatement of the Nii Kyap territory and other adjustments on the east border of the Gitksan territories.

The foregoing is a very brief, incomplete and general description of the external boundaries advanced from time to time by the plaintiffs during the course of these proceedings. It is not at all surprising that there would be changes in the presentation of such a vast concept, but where the validity of the claim depends upon a reputation of title, or its equivalent, substantial changes raise serious questions about whether a reputation has been proven to the extent required by law.

### 3. The Internal Boundaries

Internal boundaries, as shown of Exs. 646-9A and 9B, are far more significant. With them, as well, there have been significant changes which I must now proceed to consider in much greater detail.

I find this a most difficult part of this case. This is because, in addition to considering counsel's analyses, I have had to consider not just the details, where legal truth may usually be found, but also the broad sweep of the evidence. At the end of the process I am left in a state of much uncertainty.

#### (a) General Discussion

As I have said, the plaintiff's final position on their internal boundaries is depicted on Exs. 646-9A and 9B, which are reproduced earlier in this judgment (Maps 3 and 4). It can readily be seen that this patchwork covers every square foot of the territory. This result was obtained by a long and tortuous process which I shall detail in a moment.

As I have mentioned earlier, there is evidence that Brown, Ogden and other early traders in the territory found or heard about Indians living in villages on the great rivers. These probably included, with reasonable but not absolute certainty, the Skeena villages of Kitwangak, Kitseguecla, Kispiox, Kisgegas (or nearby villages), Old and New Kuldo, and the Bulkley villages of Hagwilget and Moricetown.

There is less certainty about Gitanka'at, Gitenmaax (Hazelton), K'sun and Gitangasx. Temlaxan and Dizkle, which feature so prominently in Gitksan and Wet'suwet'en oral histories, were not proven to have existed. They had disappeared by the time the early traders arrived in the territory and archaeologists have found no convincing evidence about them.

I believe Indian villages once existed at all these sites except Temlaxan and Dizkle. I have seen the clearings where Gitangasx, and Old and New Kuldo were located, and Loring's reports demonstrate the existence of K'sun in the 1890's. Equivocal, undated archaeological findings (mostly cache pits) have been made at or near several of these sites including Gitanka'at and Gitangasx. There is no reliable evidence of any other substantial villages and practically no evidence of villages except Hagwilget and Moricetown in Wet'suwet'en territory.

I am not able on the evidence to find when these locations became village sites or precisely when some of them were abandoned. Certainly there were villages in the vicinity of Kisgagas in the 1820's, but that name, Kisgagas, does not appear in Brown's reports. He heard of villages up river of the Babine-Skeena forks, probably the Kuldos or possibly the more distant Gitangasx. He also heard reports about larger villages to the west which could have been Kispiox, Kitseguecla and Gitwangaak. Certainly those villages existed in the mid 1800's and I suspect long before that. There are few reliable references to Hazelton until the mid 1800's.

Apart from Kitseguecla, where fishing seems to be good, the other villages are strategically located at canyons where fishing is easiest, or at important river forks. There seems to be good reasons for villages to be situated at these locations.

I am constrained to conclude that there probably were villages at most of these sites for a long, long time before the arrival of European influences in the territory but I wish to make a few comments. First, I do not find it necessary to review the conflicting evidence about Hazelton. It is so close to the canyon at Hagwilget that Indians may well have preferred the latter as a fishing site. Its proximity to such a proven location makes a specific finding unnecessary.

Secondly, it appears that the main reasons for these villages, except possibly for defensive or strategic reasons, was probably easy access to a principal food resource which was salmon. Neither people were particularly fond of game animals for food, and beaver was not plentiful. Every village is situated within a territory alleged to belong to a specific chief or House. For example Hagwilget is within the territory of Spooke; Kisgegas is in the territory of Tsa Bux; and Moricetown is in the territory of Wah Tah Keg'ht. These and the other villages are also within Indian reserves. These reserves sometimes includes portions of territories allegedly owned not just by the village chief, but also by one or more other chiefs or Houses. I find it incomprehensible that these reserves could have been established, and reviewed by the McKenna-McBride Commission without, so far as I can ascertain, it ever being suggested that these lands were the private preserve of just a few of these peoples.

Thirdly, there are some references in the oral histories collected by Barbeau, Baynon and others, which, in the plaintiff's submissions, suggest long time use and occupation of specific lands. Sometimes this includes associations with crests and other circumstantial connections with land. The evidence of Art Mathews Jr. (Tenimgyet) about the bears in his House crest is an example of this and there are others. In my view these are not sufficiently precise as to location to found a conclusion of specific long time occupation. In many cases what is described in these histories could have occurred almost anywhere in the territory.

Fourthly, although the Gitksan and Wet'suwet'en had well established trails permitting visiting with other villages and people, as evidenced by the trail maps marked in evidence, there was little reason for the Gitksan to stray far from their villages or principal rivers in the Skeena, Kispiox and Babine River Valleys except to visit other villages and for journeys along the grease trail through the Kispiox or Cranberry Valleys to the Nass to get oolichan oil.

Similarly, the Wet'suwet'en also had contacts with adjoining people in all directions, particularly the Babine, but they were known as the people of the Morice and lower Bulkley Rivers. There was little reason for them to stray far from their canyon fisheries at Hagwilget, (which they only occupied in the early 1820's), or Moricetown which was then called Kyah Wiget. It is just as likely the Babine would visit them where fish was more plentiful. There is a singular lack of any reliable evidence of pre or proto-historic Wet'suwet'en living in or occupying sites in the southerly part of the territory and no particular reason for them to have done so. There is evidence of occupation at places like Pack Lake, and Sam Goosley Lake in the early years of this century, but no objective evidence of when such occupation commenced. There was, in fact, little reason for the Wet'suwet'en to have lived far from the Bulkley villages with which they all seemed to have connections. There is anthropological evidence that the Wet'suwet'en were a "one village people", presumably at Moricetown.

Fifthly, as I have already mentioned, there is a strong but not unanimous body of anthropological opinion including Goldman, Steward, Kobrinski, Jenness, Robinson and Father Morice that the social and economic organization of these peoples was likely a response to the fur trade which I have already discussed. Earlier, I mentioned the opinion of Dr. McDonald that there was much destabilization in the area in the 1700's. Even Dr. Ray at one time agreed with these experts but changed his opinion because of the information he gained from the Hudson's Bay Company records. That there are differing opinions is not surprising.

While I am happy to leave these fascinating questions to the academic community, I conclude the evidence raises serious doubts about the time-depth of particular Indian presence in distant territories, that is away from the villages. It is unlikely that the plaintiffs' ancestors, prior to the fur trade, would occupy territories so far from the villages, particularly in fierce Canadian winters.

This theory is well supported by a large number of reputable experts and casts doubts upon the plaintiff's position that many of the far north and far south territories claimed by many chiefs were used for as long as they allege.

Sixthly, there is evidence that at an early stage of the preparation of their boundary evidence the plaintiffs themselves decided to base their claims upon trapline information. An examination of the trapline boundaries, such as those shown on Ex. 1243-G, and other trapline information, of which Tsabux Namox-Goosely Lake, Kweese-Burnie Lake, Gisdaywa-Owen Lake, Antegiliubx North-Upper Kispiox River, Wiigyet-Chipmunk Creek, Nii Kyap-Malloch Creek, Samooh-Tahtsa Lake, Knedebas, and others show a remarkable correlation with trapline boundaries.

I appreciate that the trapline information is taken from metes and bounds descriptions, and lacks some precision, but I am satisfied the efforts to translate these descriptions onto maps is sufficiently accurate to demonstrate striking similarities between internal boundaries and trapline registrations.

It is true that trapline registrations only began in 1926 when Indians were encouraged to register the traplines they were using so as to avoid the fur trade equivalent of claim jumping. Mr. Sterritt, in Ex. 384 concedes this correlation, stating that "... Gitksan traplines became a sort of official provincial register of the Gitksan hereditary system of land ownership that exist to this day." It is far more probable, in my view, that the internal boundaries advanced in this case arose from the traplines rather than the other way around. The existence of so many non-Indian owned traplines in the area, and the failure, until recently, of some Indians to retain these traplines for their Houses raises serious questions about the claims of Houses to specific lands.

While there are many differences between internal boundaries and trapline registrations, there are also so many similarities that I am driven to conclude, on this ground, as well as on other grounds, that the source of many internal boundaries was not indefinite, long use prior to European influences, but rather from fur trade user which began after the arrival of European influences in the territory. It cannot be said that the balance of probabilities on this issue favours the plaintiffs.

Lastly, in this series of observations about the internal boundaries, I listened with the greatest possible care to the evidence and arguments of counsel but when I look at Exs. 646-9A and 9B, I am unable to accept that such a complete and intricate Balkinization of this vast area could probably be accurate. There was no reason, until the fur trade, for these people to have any boundaries, and the unusual shape of some of the territories leads me to doubt their authenticity. As examples, I need only mention the Wiigyet-Kuldo and Deep Canoe Creek Territory in the north central part of the territory, and Goohlaht in the south-west. They and many others appear to be excessively gerrymandered or artificial which seems inappropriate for an aboriginal society.

Further, I am troubled by the fact that so many chiefs claim so many different, widely scattered territories. Gyologyet's 3 territories span over 80 miles in a north-south direction but at least they are adjacent. Wiigyet claims 5 territories; Wii Minosik claims 4 widely scattered territories; Miluulak claims 4 territories; Hagwinlegh claims 5 territories stretching from west of Smithers to south of Burns Lake; and Ghoohlaht's 3 territories almost cross the southern part of the territory, a distance in excess of over 100 miles and he also claims one territory east of Moricetown.

It would not be fair for me to conclude that the above is inconsistent with Indian custom or practice for there is no evidence to that effect, and I must not see with uncultured eyes what may not be there. Viewed with judicial eyes, however, these considerations alert me to be cautious, and to scrutinize the evidence with great care. I am left, as I have said, with much uncertainty about these internal boundaries, particularly when the process in which they were prepared has not been objective.

I turn to another series of arguments which also lead me to conclude that the internal boundaries are not reliable indicators of aboriginal use. First, however I wish to mention the great emphasis placed by the plaintiffs upon the importance of these internal boundaries and the steps taken by the plaintiffs to collect the evidence necessary for the proof of these boundaries.

In his opening, Mr. Rush stressed the detailed knowledge of the chiefs about their individual territories. He said,

> "In order for Chiefs to perform their role as witnesses to this distinctive form of public acknowledgement of land title, they are trained by their predecessors in the boundaries of their own House's territories, and the

> boundaries of the territories of their neighbours, and those with whom they are socially closest."

On this basis it would be reasonable to assume that the evidence necessary for this case, although voluminous, could be assembled without undue uncertainty.

What happened is that, beginning in 1973, following the **Calder** case, the plaintiffs began thinking about their boundaries, and they employed Mr. Sterritt to start collecting information by looking at maps prepared by Chris Harris (who died in 1975), and by talking to chiefs, and making notes of their evidence.

Gradually, information was collected from interviews and casual conversation, (without regard, I am sure, to the hearsay rule of evidence), and by numerous field trips. This information was transferred to Marvin George, a skilled cartographer, who prepared most of the maps I have already mentioned and a great many others.

This process eventually led to the preparation of the internal and external boundary maps presented or disclosed prior to the commencement of the trial.

The trial started in May of 1987 in Smithers and continued there for 6 weeks ending in June, 1987. It was then adjourned to be continued in Vancouver. During the time in Smithers the plaintiffs were only able to complete the evidence of 3 principal witnesses, Mary MacKenzie (Gyolugyt), Mary Johnson (Antgulilbix), and Olive Ryan (Gwaans, of the House of Hanamaxw). In addition, during that 6 week period, some of the evidence in chief of Alfred Joseph (Gisdaywa), was taken, but his evidence could not be completed before the end of June.

Each of these 4 witnesses gave detailed evidence about the internal boundaries of their territories, or the territories of their Houses even though some of them had little personal knowledge, but it was apparent, if the internal boundaries of all of the territories of all of the Houses were to be proven by viva voce evidence, that the trial would be much longer than was then anticipated. The estimated length of the entire trial was then estimated to be 13 months.

For this reason, and as mentioned above, the plaintiffs responsibly agreed to prepare Territorial Affidavits for most of the Chiefs which is a process authorized by Rule 40 (44).

It will be useful to quote the precise order made in this connection, dated Oct. 23, 1987"

> "THIS Court FURTHER ORDERS that the Plaintiffs be at liberty to adduce, by affidavit, evidence of facts or documents relating to the location, boundaries and geographic landmarks of the territories claimed by the Plaintiffs and their Houses, but that the Plaintiffs not be precluded from arguing from such facts, or based upon such facts, that an inference of ownership be drawn.
>
> THIS Court FURTHER ORDERS that the deponents be available for cross-examination at trial or on commission, as may be agreed upon, or as may be ordered in due course."

The defendants did cross-examine some territorial deponents on their affidavits. I have no doubt this process saved a great deal of time at trial. The plaintiffs reserved the right to adduce internal boundary evidence from some witnesses and they did so in some cases.

### (b) The Preparation of Territorial Affidavits

These Territorial Affidavits were prepared under the direction of Neil Sterritt, Marvin George and other researchers. They are largely in the same form. An example is Schedule 5, a photo copy of Ex. 605, which is the Territorial Affidavit of Walter Blackwater, (Diisxw). It describes 8 territories claimed by 7 different chiefs who, for convenience, did not submit separate affidavits or give evidence at trial. I believe Ex. 446 the Territorial Affidavit of Stanley Williams (Gwis Gyen), which covers 24 territories claimed by 11 different chiefs, is the most comprehensive of all of the Territorial Affidavits.

I have no doubt the Territorial Affidavits represent the best efforts of the plaintiffs to prove a vast collection of facts from which they argue I should infer exclusive long time use by individual Houses of the specific lands described in the affidavits and depicted on Exs. 646-9A and 9B. I accept that the plaintiffs have done their very best in this endeavour, and that these affidavits constitute the best evidence they could adduce on this question of internal boundaries.

Unfortunately, the task seems to have been too much for them. In the analysis which follows I shall not find it necessary to refer to all of the many arguments advanced by all the parties or to discuss them in nearly the same detail as they did.

### (c) Discussion

Firstly, the defendants attack the process by which these affidavits were prepared. The plaintiffs purport to rely heavily upon declarations made by deceased persons, yet it is obvious that Mr. Sterritt and others had been engaged for over 10 years collecting information from a mixture of witnesses some deceased and some still alive at the time of the affidavit project. During this process, there has been much intense discussion within the Indian communities about the collection of this information for land claim purposes. This deprives the process of the objectivity which would have added confidence to it.

As mentioned, many maps and draft interrogatory sketches were prepared before the affidavit project began. Many of these documents are markedly at variance with the later maps and it is impossible to be confident the affidavits are all based upon information obtained only from personal knowledge or deceased declarants. Further, of course, the credibility of later alleged reputations is seriously weakened by earlier, different assertions of ownership or use.

Thus Antgulilbix, in her Interrogatory Sketch, and in all the maps prepared before the start of the trial, alleged her House was the owner of territory near Kispiox while at trial she agreed a part of it was owned by a different chief, and there are many similar instances of changed reputations.

Also, it is obvious that living witnesses cannot prove long time use from personal knowledge. It accordingly became necessary for the plaintiffs to rely upon the reputation exception to the hearsay rule to prove a reputation for long time use or occupation by declarations made by deceased persons.

The defendants attack this process by reference to the fact that most deceased declarants known to living witnesses could not likely prove a reputation for long time use of specific territory far enough back in time to establish the plaintiff's case. In this respect the defendants rely upon the evidence of anthropologists who tend to doubt knowledge of genealogy, let alone specific land use, beyond 100 years or so.

An example of the difficulty in this connection is Ex. 605, the Territorial Affidavit of Walter Blackwater (Diisxw), of the House of Niist, relating to the Galaanhl Giist territory, known as Slamgeesh River, in the north central portion of the Gitksan territory. According to Mr. Blackwater, he was told about this territory and its boundaries by his grandfather, the late Moses Stevens (Dawamuxw), by his grandmother Esther Stevens (Asgii), by his mother Mary Blackwater (Diisxw), and by several others. They all told him "... this territory belongs to Gwinin Nitxw." I overlook for the moment that this is not reputation evidence. This and other affidavits go on to describe the various territories by reference to prominent geographical features, and each section of an affidavit dealing with a specific territory ends with the following or equivalent statement:

> "43. The boundary of the Galaanhl Giist territory described above has remained the same through my lifetime and the persons mentioned in Paragraph 39 told me that it has remained the same since long before the arrival of European people here. They told me that the members of the House of Gwinin Nitxw had owned, harvested and looked after the Galaanhl Giist territory from generation to generation.
>
> "44. I have heard the Galaanhl Giist territory described in the Gitksan feast as being owned by the House of Gwinin Nitxw."

The format of all the Territorial Affidavits is more or less the same. In some affidavits, the format is changed slightly, such as in the same affidavit, with respect to the territory of the Dam Tuutswwhl territory claimed by Wii Minosik, where it is also said that the deponent's informants also told him the information about that particular territory had been passed on to them by the former Wii Minosik, "who is now deceased." Similar language appears in many affidavits. So far as I can ascertain, nothing turns on different language in any of the affidavits and I do not recall any arguments being advanced on that basis.

Returning to Mr. Blackwater's affidavit, Moses Stevens was born in 1861, and he died in 1971. Walter Blackwater was born in 1923 but we do not know when the declaration was made. It must have been made between, say, 1928 and 1971. I do not know what Moses Stevens, or any of the declarants said. The plaintiffs case, of course, is that if this territory belonged to Gwinin Nitxw at any time then it must have been in his House for a very long time. The affidavits could have been more explicit. Unless they state what the declarants actually said it may represent a conclusion based upon belief rather than upon the fact of reputation or other knowledge. I discussed all this in my earlier judgment.

One of the plaintiff's maps of internal boundaries, dated October 17, 1985 (Ex. 646-4) shows part of this territory was claimed by Dawamuxw, and others, while Ex. 647-9A, based upon Territorial Affidavits, attributes it to Gwinin Nitxw.

This poses a serious difficulty for the plaintiffs, as it is impossible to conclude that a reputation of long time use of this specific territory exists in favour of Gwinin Nitxw when as recently as 1985 it was attributed to others. The plaintiffs assert mistake or misunderstanding.

Thirdly, the defendants question the reputation upon which the plaintiffs rely. The reputation alleged by the plaintiffs is confined to the community of the plaintiffs themselves. The plaintiff's aboriginal neighbours have been excluded from this process although they have an interest in some of these areas where there are overlapping claims, and inconsistent land claim disputes still exist even after numerous efforts to arrange settlements. Chapman and Bear Lakes areas are specific examples of this, and the overlap claim of the Carrier-Sekanni, as recently as 1987, includes almost one-half of the territory claimed by the Wet'suwet'en.

Even within the plaintiff's community, details of boundaries were not widely known. Alfred Joseph said chiefs are very reluctant to talk to other Wet'suwet'en about their territory; Art Mathews Jr. said it is hard to follow a chief's boundary descriptions because "they have a language unique of their own" (sic); and several witnesses said they had seldom, if ever, heard their own boundaries described in the feast hall. There has been no reputation proven in the non-Indian community.

Fourthly, the plaintiffs and their ancestors have been actively discussing land claims for many years, long before the McKenna-McBride Commission in 1914. This has been a very current issue with the plaintiffs for a very long time. The collection of evidence in such a climate deprives it of the independence and objectivity expected for reputation evidence. It may even render the declarations inadmissible for the authorities suggest the declaration, not just the reputation, must have been made before the controversy in question arose: **Phipson,** (13th ed.) para 24-28.

In the **Berkley Peerage Case,** (1811) 4 Camp, 401; 171 E.R. 128, Chief Justice Mansfield at p.135 (E.R.) stated:

> "General rights are naturally talked of in the neighbourhood . . . Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; and to admit them, would lead to the most dangerous consequences. Accordingly, I know of no rule better established in practice than this, that such declarations shall be excluded. . . .
>
> I have now only to notice the observation, that to exclude declarations you must show that the **lis mota** was known to the person who made them. There is no such rule. The line of distinction is — the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness." (p.136, (E.R.))

This is a particularly significant limitation on the value of reputation evidence as an exception to the hearsay prohibition against out of Court declarations particularly when those asserting such reputation and their ancestors have so thoroughly convinced themselves about the absolute correctness of their beliefs during over 100 years of dialogue.

Fifthly, the authorities suggest the reputation which is the subject of the declaration must be undisputed, that is a settled public consensus, after the sifting of claims and counterclaims; **Wigmore,** vol. 5, paras 1583, 1588.

It can hardly be said that the plaintiffs claims are undisputed, particularly on the external boundaries which are the subject of numerous overlapping claims by other Indian peoples. A claim to an exclusive interest in land against the Crown, based upon reputation for long time use would require very strong evidence.

With regard to overlapping claims by other Indian peoples, the evidence discloses conflicting claims both along the external boundary, and indeed into the very heartland of the territories claimed by the Gitksan and Wet'suwet'en peoples in this action. These claims are advanced by Tsimshian, Nishga, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples. It was not made clear to me what position the Babine people take with respect to this matter but there seems to be much uncertainty about the Bear Lake area. The position of the Cheslatta Bands is also uncertain, but they and the Babine Indians have many reserves in the southern part of the territory claimed by the Wet'suwet'en. The validity of these conflicting claims has not been proven, but the very fact such claims have been made cannot be overlooked in any discussion about a certain reputation for "undisputed" ownership or occupation of lands.

As for non-Indians, Mr. Shelford, for example, has been living near the west end of Francois Lake since the 1920's. Much of this area is known as the Shelford Hills. He did not know until recently that the few Indians in his neighbourhood, with whom he was always on friendly terms, claimed to be the owners of both his trapline as well as their own and all the other lands in the area. This seriously questions the existence of an undisputed, settled reputation sufficient to found a declaration of any kind of interest in land.

Again it is impossible to infer a community reputation for an interest in land when a prominent, life long resident in the area like Mr. Shelford, a Member of the Legislature for many years, and a Cabinet Minister for a time, who acknowledges hearing about general land claims for a long time, has never heard until very recently of claims of ownership or jurisdiction, or claims to specific lands, including his own, by Chiefs whose families he has known personally for most of his life.

I do not say the Territorial Affidavits are not admissible, for they contain much that is properly receivable as evidence. What is inadmissible, according to the authorities, are the declarations of ownership or use which would have been inadmissible whether given orally in court or by affidavit. I regret this finding greatly because the affidavits probably represent the best the plaintiffs can do in this connection. It does not appear to me, however, that the Supreme Court of Canada has decided that the ordinary rules of evidence do not apply to this kind of case. I do not understand the authorities to permit a court to suspend the laws of evidence even in a special, difficult case like this one.

Applying the same principle I mentioned earlier, that witnesses do not take easily to the concept of reputation evidence, I believe it is open to me to treat these inadmissible statements as the deponent's description of a reputation in the feast hall. I believe that is what was intended, and to that limited extent I have taken these affidavits into consideration. That, however, does not get over the hurdle that reputation is just the reputation of the feast hall and is not the reputation of the community. The community in question is surely much more that those who attend feasts.

On this basis, it is my conclusion that the plaintiffs have not established the kind of reputation the law requires as proof of this ingredient of their case. As I see the matter, however, there is a much more serious problem with the proof of this part of the plaintiffs' case.

### 4. Uncertainties

Apart from the foregoing, the plaintiffs would still fail on this issue of internal boundaries.

This is because, after making what I believe are substantial and appropriate discounts for the difficult task the plaintiffs have undertaken, and due allowances for human frailty, faulty memories, imperfect communication, erroneous assumptions, incorrect inferences and other error-inducing processes, I have concluded there are far too many inconsistencies in the plaintiff's evidence to permit me to conclude that individual chiefs or Houses have discrete aboriginal rights or interests in the various territories defined by the internal boundaries.

To put it another way, it has not been established that the internal boundaries represent valid subdivisions of Gitksan and Wet'suwet'en aboriginal lands accruing just to chiefs or Houses. To make this finding, it has been necessary to consider all the evidence in great detail. Fortunately, counsel have assisted me greatly in this connection by useful summaries of the evidence relating to the individual territories claimed by the plaintiffs.

## 5. Evidence about Discrete Territories

In their Summary of Argument the plaintiffs furnished a synopsis of the evidence relating to each of the 133 territories. This is found in Vol VI of the plaintiff's outline, and comprises about 489 pages. The note I made at the conclusion of their submissions on this question, records plaintiff's counsel submitting that the evidence demonstrates:

> 1. knowledge by the people of land and House Territories;
>
> 2. knowledge of names and places by which their lands are known;
>
> 3. knowledge of lands came from their ancestors and is known in the community and passed along:
>
> 4. the connection of chiefs and House members to their history and crests and to their names and territories;
>
> 5. the use of the territories and resources such as moose, bear, etc. as well as berries, trees and all resources;
>
> 6. management by chiefs and Houses of resources and harvesting of them;
>
> 7. in short, plaintiff's counsel submitted the evidence supports their claims to ownership as claimed.

The province, on the other hand, submitted the evidence falls far short of establishing the credibility of the internal boundaries. The province attacked the admissibility, form and content of the plaintiff's evidence, particularly the Territorial Affidavits, and embarked upon a detailed analysis of the evidence regarding 5 specific territories said to be representative of all the territories. The province's Summary, preceding such analysis is in these terms:

> **A. Gyolugyt**
>
> Map 9A conflicts with the Benson territorial affidavit and with other maps identified by Mary McKenzie as showing the correct boundaries. The territorial affidavit contains false statements and conflicts with the affiant's evidence on cross-examination.
>
> **B. Antegiliubx South**
>
> Map 9A conflicts with other maps identified by Mary Johnson as showing the correct boundaries. There is no evidentiary basis for much, if not all, of the boundaries on Map 9A.
>
> **C. Gwinin Nitxw — Slamgeesh**
>
> Map 9A conflicts with several other maps in evidence. There is considerable evidence that until 1988 most of the territory was attributed to Dawamuxw or possibly Niist.
>
> **D. Samooh — Tahtsa Lake**
>
> There is much evidence that this is Cheslatta territory which should not be included in the Claim Area.

### E. Madik (Kanoots) — Buck Creek

> On cross-examination, the affiant testified that the territorial boundary description was false. There is no basis in the evidence for the precise western boundary shown on Map 9B.

There followed, a 94 page analysis of these 5 territories demonstrating many inconsistencies. The province alleged the same exercise could be done for each House territory, but submitted on the "house of cards" theory that the plaintiffs must fail on all territories if they failed on these 5 territories. In other words, the province submitted that the integrity of the network of internal boundaries shown on Maps 9A and 9B depends upon the validity of each of its parts.

It may have been something I said about doubting the house of cards theory that led the province then to submit a Table of Inconsistencies relating to the evidence of 69 further territories and a detailed analysis of 3 further Gitksan territories (Spookw, Wiigyet — Skayanst, and Wii Minosik — Gwindak (Shedin Watershed), and 2 Wet'suwet'en territories (Wah Tah Keght and Hagwilnegh).

Counsel for the province asserted, correctly I think, in so far as Gitksan and some Wet'suwet'en territories are concerned, that if these analyses are accepted in any substantial way, the plaintiff's network of internal boundaries would indeed collapse as the boundaries of many adjacent territory would likewise be inaccurate.

In Part IX of its Summary of Argument Canada furnished a 298 page analysis of the plaintiff's territories which is largely dedicated to a review of the evidence of use of the territories showing in many cases the absence or minimal use of many of the territories for many years.

In Reply, the plaintiffs submitted a 12 page response to the province's analyses of the first five territories, alleging in the main that the evidence about common boundaries of adjacent territories answered the criticism's of the province. The plaintiffs also replied to Canada's submission on territories (46 pages), but does not seem to have furnished a written Reply to the analyses of the 69 and 5 territories furnished by the province.

All these summaries and analyses of territorial evidence were, of course, the subjects of intense oral submissions during argument.

## 6. The Details

It has not been necessary for me to undertake a further detailed analysis of all the evidence. Counsel have done that admirably, and I would be walking over well ploughed ground if I were to do it again. But it is not a question of choosing one analysis over another, for broad judicial judgment is also required in this exercise. This is because in the case of most territories there is some evidence or testimony to support the separate claim of some chief, House or sub group. But this evidence is so intermixed with and subsumed by trapping practices, anecdotal history and wishful belief that counsel's detailed arguments become mainly useful as references to evidence. This evidence, in total, is so contradictory and inconsistent that it would not be safe to make a declaration of exclusive interest for any of these many territories. That this is so is demonstrated by the extracts of argument which I have included in Schedule 6.

I believe reference to some of the evidence about a few individual territories will support the conclusion I have reached on internal boundaries. I do not intend these examples will necessarily be completely representative as each territory is sufficiently unique that they must all be considered individually. I have tried to do that, and what follows is intended, as I have said, merely to illustrate the basis upon which I have reached my conclusions.

In this respect I have not confined myself to territories within the area to which I believe aboriginal rights attached before sovereignty because I am presently considering the reliability of the the plaintiffs' process.

I do not pretend that I have checked each reference to evidence in the summaries, but I have sampled enough of them, and I have examined references to related territories sufficiently to satisfy myself that the internal boundaries are not reliable bases for declarations of chief or House rights to individual territories. It is mainly the uncertainties and inconsistencies in all of the evidence, viewed together with all of the facts and circumstances of the case, that persuades me to that conclusion. The examples I have chosen and the extracts from Counsel's arguments illustrate the magnitude and difficulty of this exercise.

There are serious inconsistencies about so many territories that the process is unreliable. This leads me to conclude that this part of the plaintiffs' case is not proven.

I do not question that some of the plaintiffs, and some of their immediate ancestors had associations with many of areas they now claim. In a general way I accept that proposition as to most of these areas. It is the nature of that association and the details of precise boundaries that precludes me from accepting the internal boundaries as proven facts in this case.

### (a) Galaanhl Giist (Slamgeesh River) Territory

This territory is claimed by Solomon Jack, (Gwinin Nitxw), who claims 2 specific territories on either side of the Skeena River. It is the northerly Gwinin Nitxw territory located in the northcentral Skeena area near the ancient, now deserted Indian village of Gitangasx. On our view of the territories in 1988 we had lunch on this territory which is on the old telegraph trail leading to the Yukon. Mr. Blackwater was with us and the trail could be seen when he pointed it out. The plaintiffs say this is the most intensely investigated territory in the analysis of the province.

The plaintiffs sought to establish the details of this territory, in part, by the Territorial Affidavit of David Blackwater, Ex. 605, Sec. E, which is Schedule 5 to these Reasons for Judgment. This territory was much discussed in the evidence of several witnesses.

I have attached as Schedule 6 (Part 1, (a), (b) and (c)), the written submissions of the parties regarding this territory which were fully supplemented by oral argument.

It is apparent there is much confusion about the reputation of this territory. The plaintiffs argue that all this difficulty arises over a misunderstanding about the basis upon which Moses Stevens used the territory in this century, but even if that is so, the plaintiff's evidence of a special interest in the territory of Gwinin Nitxw, or its boundaries, falls far short of proof which would support a declaration of exclusive aboriginal rights either against the Crown, other interests, or even other Indians.

### (b) Gyolugyt, (Mary McKenzie)

Mary McKenzie is the current holder of the name of Gyoluugyt and on behalf of her House she claims a very large area in the north-east portion of the territory. It is one of the largest territories claimed by a Gitksan chief, and includes 3 distinct territories. Mrs. McKenzie, who was 68 years when she gave her evidence in 1987, said that her family originated in the "Wild Rice" village of Gitangasx but moved to Kuldo and later to Kispiox, "hundreds or thousands of years ago." The pole of her House is said to be at Kuldo which is now deserted. She has never been on the territories of her House, although she said her husband and others have trapped there with her permission.

I have set out in Schedule 6 (Part 2, (a), (b) and (c)), the written submissions of the 3 parties on these territories.

The evidence falls far short of establishing long time use of much of this territory before the arrival of European influences. It establishes that in the believed history of these people they migrated from a village considerably east of the Gyolugyt territories to Kuldo which is closer to the territories, but then moved further south, away from the vicinity of these territories at some unknown date before the birth of her mother. Neither Mrs. McKenzie nor her son have been to Kuldo, although she said her husband went there in 1947 or 1948 and trapped on her territory. Much of Mrs. McKenzie's information about these territories has been acquired quite recently, no doubt in connection with this action.

What little use has been made of this territory was by others, and it is obvious Mrs. McKenzie does not have any precise understanding of the boundaries of the territory she claims. It fell to Richard Benson, a member of the House of Luus, to swear the Territorial Affidavit for her House, and he, also, was unsure of its boundaries. He admitted parts of his affidavit were not correct.

The discrete claim of this House to this territory was not, established in the evidence.

**(c) Antgulilbix — South, (Mary Johnson)**

This Gitksan territory is one of 2 claimed by this Chief and House, and is located in the Date Creek area near Kispiox where Mrs. Johnson was born and still resides. She was 80 years when she gave her evidence, but seemed reasonably alert for a woman of such age.

There is no Territorial Affidavit for this territory. Instead, the plaintiffs rely upon evidence at trial, including evidence about surrounding territories.

I have set out in Schedule 6 (Part 3, (a), (b) and (c)) the written submissions of the parties on this territory which were, of course, fully argued at trial.

I regard it highly significant that Mrs. Johnson, who was born and lived all her life in Kispiox, in the immediate vicinity of this territory, did not have an understanding of her alleged boundaries. I have already mentioned her age, but I do not attribute her misconceptions to her age.

It is obvious that the boundaries of her territory, as shown on Map Ex 646-9A, were reconciled prior to and during the litigation. The final result is more an accommodation to views contrary to her own than to the kind of oral history for which the plaintiff's contend. I find it incomprehensible she would not earlier have been aware of the boundaries of her territory if there was any reputation in that connection and if the feast system had been functioning in this respect as the plaintiffs allege.

**(d) Gisdaywa — Bewennii Ben (Owen Lake), Alfred Joseph**

This large, irregular shaped Wet'suwet'en territory is in the south central part of the territory south of the non-Indian village of Houston. Mr. Alfred Joseph (Gisdaywa) is chief of the House of Kaiyexweniits (about 30 members), and he recited its boundaries from memory in his evidence, but he has had very little connection with the territory. He was born in 1927 and he remembers being on the territory when he was a small boy, but his family moved to Hagwilget in 1931, and he had little association with the territory even after he took the name Gisdaywa and became chief of his House in 1974.

He continued to reside in Hagwilget, where he has been a long serving and distinguished Chief Band Councillor. Apart from occasional visits, he has spent little time on the territory. He said he was always aware that some members of his family were trapping on the territory particularly his cousins who had a trapline in the south west part of the territory. It is from these cousins that he has learned a great deal about the territory. He adds, however, that he also learned a great deal about the territory from his parents and grandparents.

Mr. Joseph has been the most visible of all the Wet'suwet'en chiefs in the preparation of evidence for this case, having been employed full time, or almost full time, on the case for the past several years.

Probably because there is no discernable difference in the Interrogatory sketch, internal boundary map (Ex. 5) and map 9B, the province has not advanced a detailed analysis of the evidence about this territory. I have set out in Schedule 6, (Parts (a) and (b)) the detailed submissions of the plaintiffs and Canada.

The province instead relied mainly upon the unlikelihood of the whole scenario portrayed by Mr. Joseph, which was really that of an absentee becoming chief of a territory with which members of his family had been associated in the early years of this century, applying for pre-emption, Indian Reserve lands, and traplines, and substantially abandoning it in the early 1930's.

It was pointed out that when he as asked to estimate the size of his territory he replied 40 sq. miles when it is actually 315 sq. miles. The explanation was that he was referring to the area used for trapping which I regard as confirmatory of the view that traplines are often equated to territories. A neighbouring Wet'suwet'en chief, Christine Holland (Knedebeas), had a trapline on his territory under circumstances he could not explain, except perhaps that some arrangement had been made with an earlier chief.

During recent years the territory has been partly logged, and subdivided probably in connection with the growth of the nearby village of Houston. When asked about the areas where his grandmother picked berries he said:

> "A I have not seen it lately. But the areas that my grandmother picked are all today subdivided and towns are — there are buildings on it and some commercial building on that area so it's — so if one is going to pick those berries you have to go quite a ways out."

There is no real evidence about when the ancestors of the members of this House first started to use this territory. There is only the evidence of what Mr. Joseph's grandparents, parents and uncles told him about use of the territory which is vague as to boundaries. Even the poles or poles of his House are located at Hubert, near Telkwa, 30 or so miles northwest of the territory at the home of his uncle Thomas George who was a former Gisdaywa.

I consider it significant that when his ancestors were allotted an Indian Reserve at Owen Lake, it was attributed either to the Ominica or Broman Lake Bands, confirming the conclusion I have reached that in many of these matters the Wet'suwet'en and Babine peoples are indistinguishable.

The evidence is not sufficient to support a discrete and exclusive right to this territory by just the members of this House.

### (e) Spookw — Stekyawdenhl, or Rocher de Boule

Steve Robinson (Spookw) is the chief of the House of Spookw. He has been a caretaker chief for many years even though he is a member of the House of Yogosip, and a chief of both that House and of the House of Guuhaadk. For the House of Spookw, he claims a territory which includes the forks of the Skeena and Bulkley Rivers, the villages of

Hazelton (Old and New), as well as the magnificent Rocher de Boule, also known as Hagwilget Peak or Stekyawdenhl.

Basically, the province asserts discrepancies regarding the boundaries of this territory in various maps and other documents including Mr. Robinson's Interrogatory Sketch and various maps including Exs. 5, 102, 335, 336 and 646-9A.

I have set out in Schedule 6, (Part 5 (a), (b) and (c)), the written submissions of the parties on this territory.

I am particularly impressed by the submission that this territory is in the very heartland of Gitksan country. I would not have though that there would have been any doubt about its boundaries having regard to the tremendous importance the plaintiffs have attached to that question.

I am left in the position where I simply cannot say whether the members of the House of Spookw have the sole right to the use of this territory to the exclusion of all other Indian and non-Indian persons.

**(f) Hagwilnegh — Keel Weniits (McDonell Lake — Telkwa River)**

This immense Wet'suwet'en territory is one of 5 separate territories claimed by the chief and House of Hagwilgenegh. These 5 territories are situated at various locations between Smithers and Burns Lake, a distance in excess of 100 miles.

I consider this Keel Weeniits territory significant because its eastern boundary is only about 5 miles west of the town of Smithers which the largest non-Indian settlement in the territory. This territory is also close to the edge of the Smithers ski and recreation area on Hudson's Bay Mountain which towers over Smithers. As with Spookw, I would have thought there would be no uncertainty about the ownership and boundaries of such a large territory located so close to a major population centre.

I have included in Schedule 6, (Parts (a), (b) and (c)) the written submissions of the parties which disclose that until quite recently it was suggested that at least part of this territory was owned by another Wet'suwet'en chief.

I am not persuaded the chief or House has an exclusive right to the use of this territory.

**(g) Samooh, Tsee Cul Dleez Ben (Tahtsa Lake) Territory.**

This mountainous territory near the south-west corner of the territory is about 100 miles south of Moricetown. It is not understandable that it was not included in the plaintiff's early maps. This claim was in progress of preparation for so long I would have thought the Wet'suwet'en chiefs, would have known from the very beginning of the process whether the people of associated Houses and clans occupied lands so far south as this territory. This territory was not claimed on the 1977 map.

But the evidence, as set out in the arguments of counsel, which I have included in Schedule 6, (Part 6 (a), (b), and (c)) persuade me this land is just as likely Cheslatta as Wet'suwet'en territory. Mrs. Jack, who swore the Territorial Affidavit was herself a member of a Cheslatta Clan as was her father. There is no reality to the plaintiff's claim to this territory.

## 7. Conclusions on Internal Boundaries

I do not think it necessary to explore further examples. The weight of evidence is overwhelmingly against the validity of these internal boundaries as definitions of discreet areas used just by the ancestors of the present members of the various Houses. As I have said, I think they more likely represent trapping areas which ancestors of the present claimants have probably used for trapping and aboriginal purposes for the past one hundred years or so.

On balance, however, the evidence is not sufficiently specific and convincing to permit me to make a declaration or judgment that would award user rights to the present claimants to the exclusion of other Gitksan and Wet'suwet'en persons in preference to other Indian and non-Indian citizens.

## 8. General Aboriginal Rights

The foregoing leaves untouched the conclusion I expressed earlier that, subject to extinguishment, the plaintiffs were entitled to aboriginal rights to some parts of the territory for the benefit of all of these peoples. The external boundary is now artificial, but it fixes the outermost extent of the lands to which I could make a declaration of aboriginal rights in this case.

I pause to say that if I were defining an area of aboriginal ownership or sovereignty it would be limited to the areas surrounding the villages I have mentioned. As no evidence or argument was advanced in this connection I do not propose to say anything further about that question. What follows relates to aboriginal rights.

The question is where to draw the line.

In this respect it will be necessary to be arbitrary. The most helpful evidence is geographical, particularly the great rivers and the location of the villages where the ancestors of the plaintiffs obviously lived and gathered the products they required for subsistence. There is hardly any objective evidence of early aboriginal presence based other than in the villages.

I start with the certainty that aboriginals have lived for a very long time at or near present day Hagwilget and Moricetown, as they probably also lived at Kitsilus Canyon (outside the territory), and at or near Ksun, Kisgegas and the Kuldos inside the territory. The reason, of course is that geographical features, such as canyons or other river conditions were advantageous for salmon fishing.

I am not so certain about Gitanka'at, Kitwangak, Kitseguecla, Kispiox and Gitangasx, but as villages were found by the early explorers at most of those locations, it is likely there were villages there in pre-European times.

Next, it is likely, in my view, that the Indians in those early times would have searched for food and other products in the vicinity of their villages. There was no need for them to go very far for such purposes, and I know of no reason to suppose they did.

It is likely that they visited, or made war with each other or with other peoples, using both the trails shown in some of the sketches adduced at trial, and by way of the great rivers both in summer and winter although there is little evidence they possessed boats. They must have had a way to cross rivers which would have been a formidable undertaking. I am sure they used some of the frozen rivers as cold weather sidewalks. It seems likely these early aboriginals would also have used the lands alongside the great rivers, between their villages, for aboriginal purposes.

I do not question that some of these ancestors may well have lived and survived considerable distances from the villages and great rivers but they would be hardy, generational recluses whose personal preference to absent themselves from villages even for their lifetimes would not create aboriginal rights based upon indefinite, long time use.

It seems to me there are three reasonable alternatives:

### (a) Alternative No. 1

Having regard to the difficulties of pre-contact travel in the territory it might be argued (I do not believe it was), that both the Gitksan and Wet'suwet'en would not have used lands and waters any great distance from their villages. Perhaps an area of 20 or 25 miles around their principal villages would be appropriate for this alternative.

I reject this alternative because it does not give proper weight to the evidence of trails between villages and throughout the territory, and the evidence is that both plaintiff groups are peoples with common clans, languages, and customs. I cannot assume they would not travel between villages and use the land in between. Applying this formula to the Wet'suwet'en, of course, would limit their zone to an area around present day Moricetown, for there is no evidence of any other Wet'suwet'en village.

### (b) Alternative No. 2

#### (i) *Gitksan*

In this alternative I have assumed the lands and waters which the plaintiffs used for aboriginal purposes would be defined by reference to a reasonable distance from their villages, and from their principal rivers which, together, constitute the heartland of their aboriginal territories. These areas must be within the territory.

It is easy, when being arbitrary, to draw a line on a map. I prefer to relate my conclusions to the evidence as much as possible. Mr. James Morrison (Tx̲aax̲ Wok̲) mentioned that, when he was a boy, the chiefs established a common hunting area at Kisgegas measured by two hours walking distance from the village. On level ground this might be between 8 and 10 miles but probably less than that in the Kisgegas area.

On the other hand, a hunter in reasonable country could comfortably walk 20 or 25 miles in a day. In this territory I think 20 miles would be reasonable and I doubt if many Indians would have found it necessary to travel that far from their villages or rivers to obtain what they required for subsistence.

On this basis it would be reasonable to define an aboriginal rights area measuring, say, 20 miles from the centre of each of the villages mentioned above and also on each side of the Skeena south of Gitangasx; on each side of the Kispiox and Babine Rivers within the territory; and on the south or west sides of the Sustat and Bear Rivers.

Such a definition might not be completely practical because there would be substantial overlaps and it might omit some likely used areas. It would also exclude some very large areas:

(a) the north-west, generally in the watersheds of the Nass and Bell Irving Rivers. I do not recall evidence about Indian villages in all of these vast areas and I know of no reason for Gitksan ancestors to use such lands on a permanent or even semi-permanent basis prior to the beginning of the fur trade;

I believe some Gitksan moved into these areas after the start of the fur trade, or later, particularly in the last 150 years when there was a reason to be there, but as we have seen since 1950, when the reason to be in a location disappeared then the land quickly became empty. If the land is substantially empty now, as I believe it is except for non aboriginal purposes such as commercial trapping, mining or logging, then I believe it was also empty for aboriginal purposes at the time of contact;

(b) The north-east and east side of the area claimed by the Gitksan. What I have said about the north-west applies also for the north-east. In addition the Nii Kyap corner is doubtfully Gitksan. Further, I am not persuaded the heavily mountained areas of the

Tatlatui and Slamgeesh Ranges were likely used for the long periods necessary for aboriginal purposes.

(c) This definition would exclude some areas south of Gitangasx, including many mountainous areas where mountain goat may have been hunted, and I am aware that part of the Babine Trail from Hagwilget to Babine Lake might be excluded. It is not possible to achieve perfection in an arbitrary award.

(ii) *Wet'suwet'en*

The situation with respect to the Wet'suwet'en is much more difficult. As mentioned, there was periodic, pre-historic habitation of some kind at Hagwilget and Moricetown, but the former was only occupied by the Wet'suwet'en in the 1820's. This would not qualify for Wet'suwet'en aboriginal interests even though it has become one of their principal centres. Hagwilget, however, would be within the Gitksan area I have defined.

It seems apparent the Bulkley River did not attract villages as did the Skeena. This is probably because it was not the great salmon river the Skeena has always been. I have searched for evidence of Wet'suwet'en villages other than Hagwilget, Moricetown, the Babine River villages (which are alleged in this case to be Gitksan), and in the Francois — Ootsa Lake areas. A search of the written outlines of all the parties identifies only Lhe Tait and Barrett Lake near Moricetown and mention of settlements of families living on land in the Bulkley Valley from which they were dispossessed in this century.

Although I believe it likely that ancestors of some present Wet'suwet'en lived in the area, I am left in a state of much uncertainty about where they were located either at the start of the fur trade or at the time of sovereignty. The evidence is that they were not nomadic. Most of the genealogies take us back only 3 or 4 generations, which is not much more that 100 years.

It is true there are now numerous settlements along the Bulkley transportation corridor, but there is no evidence of when they were first populated, and they are likely a function of the facilities which have all been built in this century. Similarly, I am uncertain when the villages in the Francois and Ootsa Lakes areas became inhabited by Wet'suwet'en if that has ever occurred.

The Hudson's Bay Company never established a post in this part of the territory. I suspect this was because it was largely an empty country. As it is empty now, it was probably empty both at the time of contact and, except possibly for some limited commercial trapping, at the time of sovereignty.

Indian reserves in this area are not helpful indicators of Wet'suwet'en habitation because there are so few of them apart from Hagwilget and Moricetown. Actual reserves are shown on Ex. 1243-D and on the map exhibited earlier in this judgment. Felix George No. 7 reserve, on the territory claimed by Gisdawya was established in this century by request of one of his immediate ancestors not because of long time use, but as a second choice when he learned that his first choice in the south was not available. There seem to be only 2 small reserves in the central area of the Wet'suwet'en territory. On the other hand there are a great many reserves in the south-east portion of the territory which are administered by non-Wet'suwet'en Bands.

Moricetown and Hagwilget are the centres these people turned to in this century when they left the land, but in the 1920's and 30's there seemed to be as many non-Indians as Indians on the land. There are Cheslatta people around the southern lakes now but some of them were moved there because of the flooding of their own land by the Kenny Dam which was built in the 1950's.

Over hanging the Wet'suwet'en claim is the Carrier-Sekanni claim to at least one half of this country (and some of the northeast corner of the Gitksan territories), as shown on Ex. 101. I am much impressed by the apparent similarity of the Wet'suwet'en with the Babine and I doubt if there was any real difference between these two peoples at the time of contact or sovereignty. They are both Athabaskan peoples who speak the same distinctive language. Until quite recently, it was the Carrier (which includes the Babine), rather than the Wet'suwet'en who were joined with the Gitksan in this land claim.

Mr. Joseph (Gisdaywa) said the Wet'suwet'en people are those who lived in the area of the Morice and lower Bulkley Rivers. This accords with the impression I have that the Wet'suwet'en homeland is more in the north and west than in the south and east of the south half of the territory. The latter areas, in my view, are just as likely to be Babine or Cheslatta as Wet'suwet'en areas.

I do not for a moment suggest that many Wet'suwet'en families such as the Hollands, Laytons, Alfreds, Michaels, Josephs and others were not on the land they now claim during the last part of the 1800's and the early years of this century. What is lacking is sufficiently precise evidence to permit me, other than arbitrarily, to define which areas of this vast territory should be charged with Wet'suwet'en aboriginal interests.

I am also reluctant to create a legal boundary when it is likely, in my view, that there was no fixed boundary in aboriginal times. I believe there were grey areas between groups of people, particularly the Wet'suwet'en and Babine, upon which aboriginal interests were probably exercised by more than one people or family. I have already pointed out that I do not accept the view that absolute exclusivity is an essential ingredient required for aboriginal user rights.

Doing the best I can in this alternative, and accepting the evidence of Mr. Joseph on this question, I think a 20 mile zone on each side of Morice Lake and the Morice River north-east to its forks with the Bulkley River, and thence northerly on each side of that river to its confluence with the Skeena River captures the heartland of the Wet'suwet'en people.

### (c) **Alternative No. 3.**

#### (i) *Gitksan*

The second alternative, although arbitrary, is based upon inferences from evidence, and complies with the well known judicial dictum that in many situations, where the evidence and inferences do not furnish a completely satisfactory answer, the judge must do the best he can. The foregoing probably represents a substantial extension of the principle expressed in cases such as **Chapman v. Hicks,** [1911] 2 K.B. 786 (C.A.) but sometimes the law affords no other process.

This alternative paints with a much broader brush and concludes that some of the ancestors of some of the plaintiffs sometimes used lands for aboriginal purposes more distant from the villages and great rivers than one would think at this time. On this basis, it becomes necessary to draw a line on a map which, as I suggested in an earlier procedural judgment, seems hardly a judicial function: something more appropriate for the Senate in Rome.

The evidence does not persuade me that the areas described above in the north-west and north-east, north of Gitangasx were probably used for aboriginal purposes by the ancestors of the plaintiffs at the relevant time.

I would fix the north boundary of the lands over which the Gitksan have aboriginal rights by drawing a line across the territory through the centre of the Skeena River where it flows past the village of Gitangasx, the Gitksan's most northerly village. This line would be extended westerly from the point where the Skeena turns south (near the outfall from Canyon Lake) and I would project the line more or less along the heights of land between the Nass-Kispiox and Nass — Skeena drainages to the external boundary in about the centre of the Kwinageese territory claimed by Delgamuukw. The line would be extended easterly from Gitangasx along the Skeena to its junction with the Sustut River, and along the Sustat to the external boundary.

If I stopped there the aboriginal area would not extend north of the Skeena at Gitangasx. To be consistent, however, I must assume some of the villagers at that location would have used some of the lands around their village, and I particularly noted the village site was on the north side of the river. I would therefore add an area north of the river within a radius of 20 miles from the village. The boundary of this area will intersect the line I previously designated. In an attempt to be tidy, I would not include any area east of the Skeena and north of the Sustat Rivers.

I would use the agreed boundary between the Gitksan and Wet'suwet'en, as shown on Exs. 646-9A and 9B, as the southern boundary of the Gitksan aboriginal lands.

(ii) *Wet'suwet'en*

I have, in the previous paragraph, already fixed the north boundary of the Wet'suwet'en aboriginal lands.

The Wet'suwet'en southern boundary is much more difficult to create, and it must be even more arbitrary. Using internal boundaries only for convenience and because they generally follow heights of land or other natural features, I would draw the line along boundaries shown in Ex 646-9B as follows. Starting on the south-westerly external boundary opposite the west end of Morice Lake, the extended line would run easterly along the south boundary of the Lootdzes Ben (McBride Lake) territory of Woos; then along the south boundary of the Bewenii Ben (Owen Lake) territory of Gisdaywa; then north-east along the west boundary of the territory claimed by Namox; then along the south boundary of Hagwilnegh's northern territory (at this location), the south boundary of Samooh; the south and east boundary of Satsan; and the south boundary of Hagwilnegh's "Topley" territory to the external boundary.

## 9. Conclusion

Making a choice between these 2nd and 3rd alternatives must necessarily be a matter of judgment based upon the best consideration I am able to give to all of the facts and circumstances of this case. For reasons which I am not able to articulate with much confidence, I have the view that the Wet'suwet'en were less concentrated in the great river valleys than the Gitksan, and more spread out in the relatively gentler country in the Bulkley valley than the Gitksan in the Skeena watershed.

This leads me to conclude that unfairness might result from the adoption of the 2nd alternative for the Wet'suwet'en. I do not have quite the same misgivings about the Gitksan because they have more village reference points. It is not essential that I choose the same alternative for both peoples.

But the Gitksan have always been much more numerous than the Wet'suwet'en, and there may have been more of them living away from villages and rivers than might be inferred from the evidence. I am also concerned that these are people without a written history and some of the unspecific references in the anthropologist's collections may well refer to events further away from the villages than I have suggested.

I believe there is a greater risk of unfairness for both Gitksan and Wet'suwet'en under the 2nd alternative. I would apply the 3rd alternative for both Gitksan and Wet'suwet'en peoples.

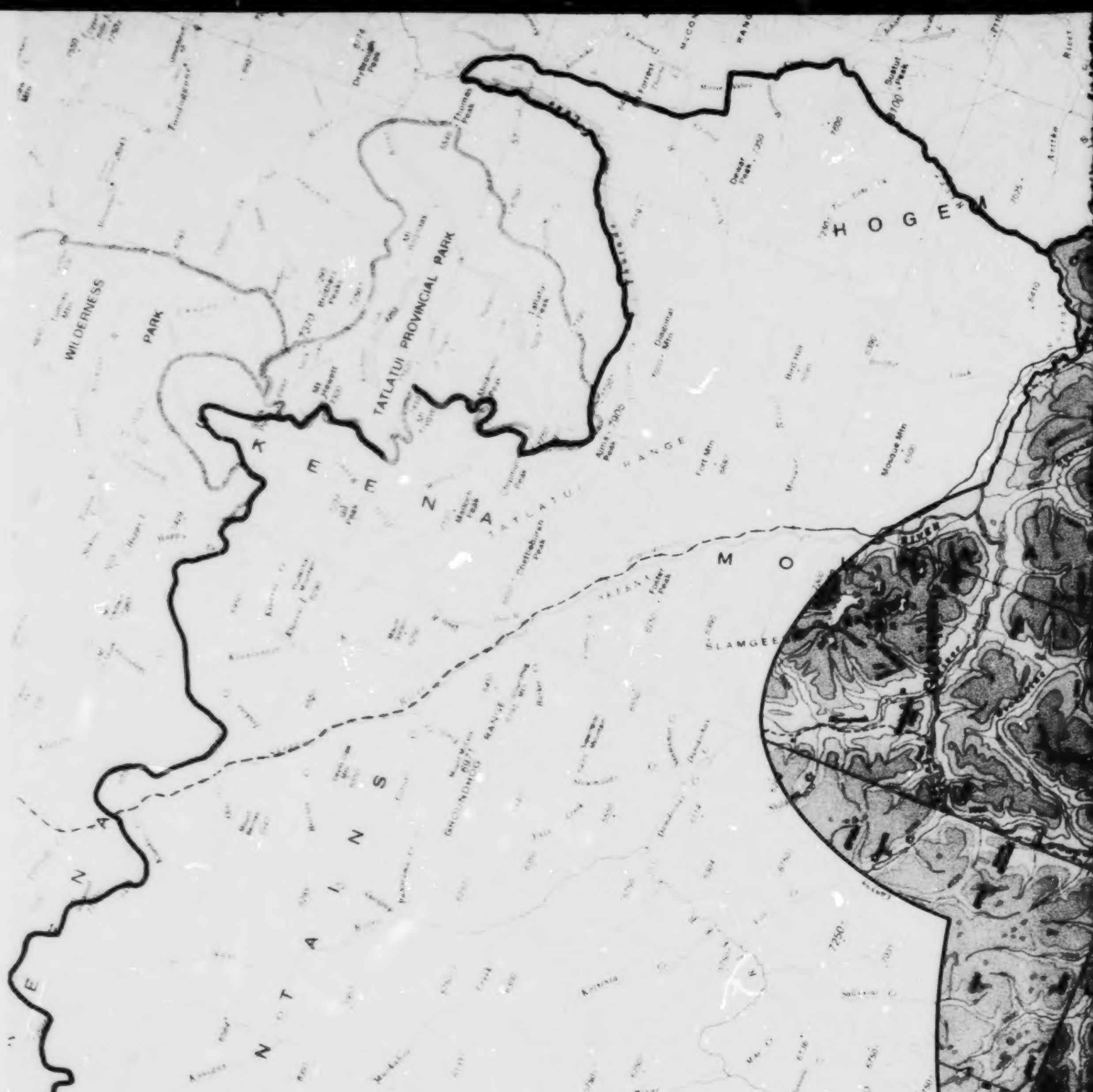
At the end of this Part is another copy of Mr. Macaulay's map upon which I have crudely endeavoured to describe the aboriginal areas I have attempted to define in the 3rd Alternative.

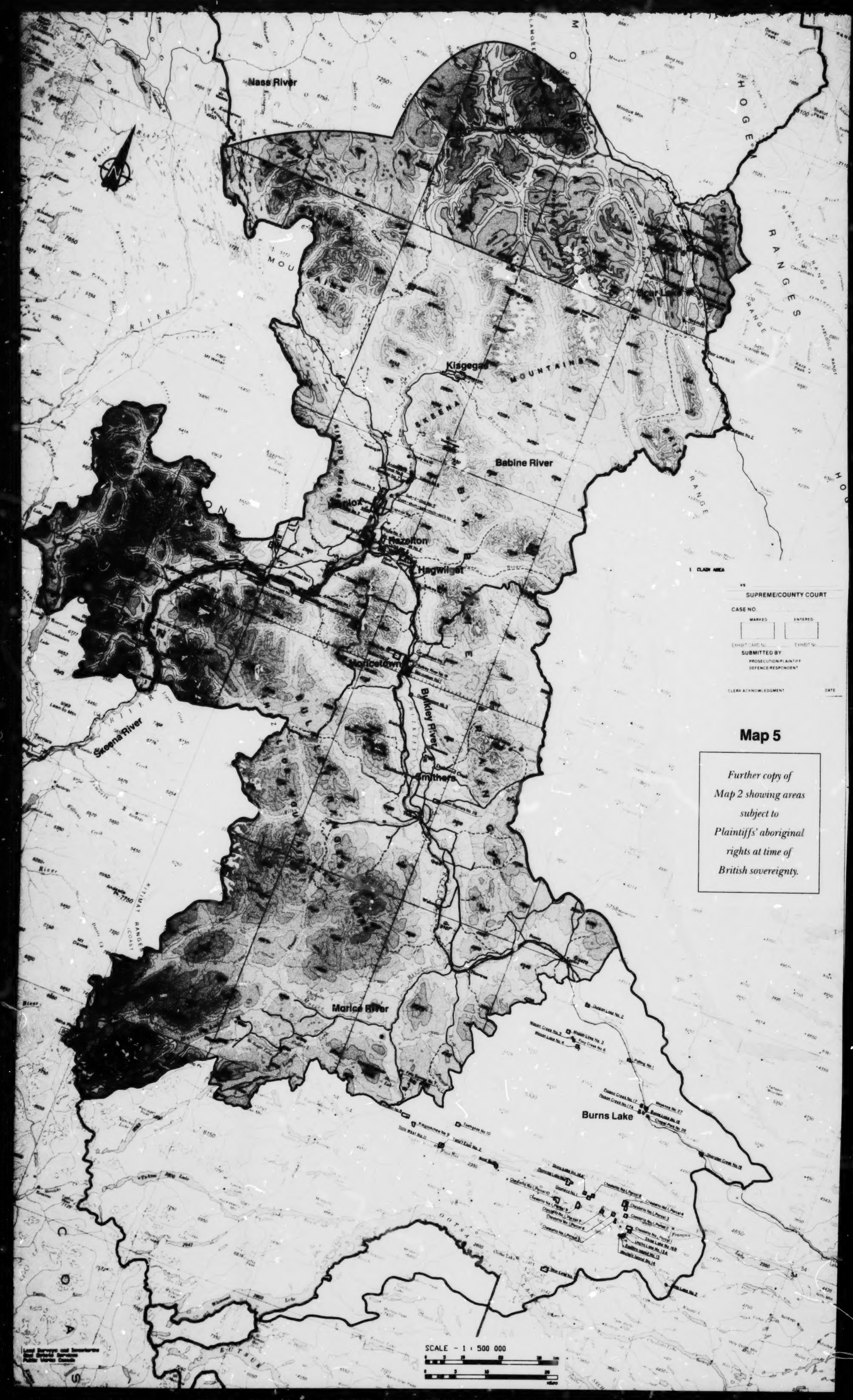
It will be obvious from the foregoing that I do not have confidence in early Gitksan and Wet'suwet'en presence north and south of the lines I established. They will understand, subject to the general law, that they are free to use the other lands of the territory along with every other citizen of the province. I am not, of course, validating or extinguishing any trapline registrations.

The foregoing boundary creations are admittedly approximate. Perhaps counsel will prepare a better map, giving effect to what I have endeavoured to describe. If they agree, they could even draw a line across the territory with a ruler. I would not wish to be understood by any of the foregoing to be authenticating the internal or external boundaries in any way.

In addition, as I do not regard exclusive use of the areas to be an essential requirement for aboriginal rights, I would not wish the foregoing reliance upon external boundaries finally or conclusively to settle any overlap questions between the plaintiffs and their aboriginal neighbours. Those are questions which may only be settled by negotiation between these peoples or by litigation between them.

If I have erred in my disposition of the questions of jurisdiction, ownership or aboriginal rights, any declaration to which the plaintiffs would be entitled would be against the province only. I do not purport in this judgment to affect the aboriginal or other rights of any person not a party to this action.


WILDERNESS PARK
TATLATUI PROVINCIAL PARK
HOGEM
SKEENA MOUNTAINS
TATLATUI RANGE
SLAMGEESH
GROUNDHOG RANGE
STRATA RANGE
COWEGGEE RANGE
BELL IRVING
WILDFIRE RIDGE
LONGVIEW RANGE
SNOWSLIDE RANGE
HANNA RIDGE
Nass River
Taylor River
7250
7650



## Map 5

*Further copy of Map 2 showing areas subject to Plaintiffs' aboriginal rights at time of British sovereignty.*

vs

SUPREME/COUNTY COURT

CASE NO.

MARKED ☐ ENTERED ☐

EXHIBIT CARD No. EXHIBIT No.

SUBMITTED BY

PROSECUTION/PLAINTIFF

DEFENCE/RESPONDENT

CLERK ACKNOWLEDGMENT DATE

Nass River
Kisgegas
Babine River
Kispiox
Hazelton
Hagwilget
Moricetown
Bulkley River
Smithers
Skeena River
Morice River
Burns Lake
HOGEM RANGES
SIKANNI RANGE
MOUNTAINS
SKEENA
KITIMAT RANGES (COAST)
OOTSA
1 CLASH AREA
SCALE - 1 : 500 000

## PART 18

# ABANDONMENT OF ABORIGINAL RIGHTS

It will be useful for the Appellate Courts to have my views on this defence in the event it is found that I have erred in the conclusions I have reached on the question of aboriginal rights.

### 1. Discussion

The defendants take the position that many of the areas claimed by the plaintiffs have been abandoned by long term non-aboriginal use. In advancing this argument Canada, for convenience, used the areas contained within the internal boundaries shown on Exs. 646-9A and 9B and I shall follow the same format because that is it way counsel organized their submissions. I do not resile in any way from the findings I have already made about internal boundaries.

Abandonment is a superficially attractive argument because it reflects current realities arising out of the historic movement of the people away from their historic villages to the larger centres in the transportation corridor. This started before Loring's time. He predicted, correctly, that this trend would continue. Thus, the defendants argue, it is anomalous that the Indians who abandoned Gitangasx, the Kuldo's, and Ksun many years ago, and more recently Kisgegas, except for seasonal fishing, should maintain aboriginal rights over vast areas of surrounding territory.

The situation is less dramatic in the Wet'suwet'en areas because there were so few villages; but even there, no less than in the north, the land is virtually empty of Indians and has probably been so for upwards of 40 years since fur prices crashed in the early '50's.

Steele, J. in **Attorney General for Ontario v. Bear Island Foundation** v. Bear Island Foundation (1984) 15 D.L.R. (4th) 321 (Ont. H.C.); aff'd (on other grounds) (1989) 5 D.L.R. (4th) 117 (Ont. C.A.), (currently on appeal to the S.C.C.), held at p. 404:

> "Finally, from the coming of the railway in 1905, major changes in location of the defendants have taken place, and the evidence indicates that, since approximately 1950, the defendants reside either outside the Land Claim Area, or within the Land Claim Area, on Bear Island or in established white settlements such as the Town of Temagami. The last person to live in the Land Claim Area, other than on Bear Island or in established white communities, lived at Obabika Lake, in 1962, although it is possible Jack Pierce seasonally occupied a cabin on Duncan Lake until 1963 or 1964. Under these circumstances, even if it were found that the Province of Canada, and subsequently Ontario, exercised complete dominion over the lands in issue and enacted legislation allowing for settlement but erred in law in failing to expressly

> state its intention to extinguish aboriginal title, I find that such title was in fact extinguished because the Indians have abandoned their traditional use and occupation of the Land Claim Area. In other words, there is no evidence of exclusive aboriginal use of any of the lands except the Bear Island Reserve continuing to the date of the commencement of the action."

This makes good sense because aboriginal rights depend upon long time and, I think, regular if not continuous use of territory for aboriginal purposes. The difficulty is not with the principle, but rather in its application in particular cases. In this connection I respectfully disagree with some academics who suggest aboriginal rights can be ignored for long periods and then revived. It largely depends on how complete the abandonment is, and for how long the territory has been unused.

Canada argues that disuse for a generation, which is usually 20-25 years, is sufficient to constitute abandonment. With respect, I think the circumstances are probably more important than any specific number of years in the first stages of disuse, and these matters are seldom absolute in the sense that all aboriginal use may not cease even though the territory has been largely abandoned.

I have in mind, for example, the 1951 crash in fur prices. If aboriginals were using a territory for aboriginal purposes, as well as for commercial trapping, and left the land because of a sharp drop in price, fully intending to return when prices improve, or intending to continue using the land periodically for aboriginal purposes although residing elsewhere, then the law would be very slow indeed to regard aboriginal user rights to be abandoned.

I think the foregoing describes this case, for I believe the Indians were probably using the lands I have identified for aboriginal purposes both before and after the start of the fur trade. Perhaps they stayed on the land for non-aboriginal purposes after the start of the fur trade, or gradually used the land less and less for aboriginal purposes. But there is no way of establishing precise categories of land abandoned, and "other." I doubt if it is possible to consider the categories closed.

Gradually, the Indians of this territory have been leaving the land and migrating to the villages for upwards of 90 years or more. Some of them have continued to use the land, some much more, and some much less, than others. I do not think I should be quick to treat aboriginal use as abandoned, but common sense dictates that abandoned rights are no longer valid and land must be used or lost.

I must also be careful not to treat abandonment as extinguishment, as each of these principles is different. Even with abandonment, however, the honour of the Crown is involved because it is the Crown that asserts this legal consequence. The Court cannot permit the Crown to pounce too quickly when there are gradually changing circumstances by treating every absence as an abandonment.

What I must do is look at the evidence and decide whether, as a question of mixed fact and law, aboriginal use in a particular area has been abandoned. I shall, of course, only consider the territories within the areas defined in Part 17, and I shall only mention those for which I think the evidence requires consideration of this question of abandonment.

So counsel will know how I have proceeded in this part of the case I wish to explain that I first read the descriptions of the territories in Canada's Outline of Argument, s. IX. For those territories that admitted an argument of abandonment I then re-read the plaintiff's summary of the territories in their Outline, Vol. VI, and their submissions. As plaintiff's summary was written before Canada's, I also read the plaintiff's Reply even though Mr. Macaulay objected that this Reply was case splitting. I have decided that in fairness I should consider the plaintiff's Reply as they prepared their summaries of the territories for the purpose of establishing internal boundaries, not in answer to an argument on abandonment. The plaintiffs dealt specifically with abandonment only in their Reply. Mr. Macaulay's objection is accordingly disallowed.

## 2. Gitksan Territories

### 1. Wiigyet — Kuldo and Deep Canoe Creek

Canada says this territory was used until the 30's or 40's, and the southern portion is now being used for some hunting and trapping, but there is no evidence the part north of Kuldo has been used since the mid-50's.

The plaintiff's do not really answer this, but stress that this is an ancient territory parts of which have been used from time to time, and that there has never been any intention to abandon it.

What troubles me about this territory is that its classification as "used" aboriginal land depends upon the evidence of, and use by, Mr. Peter Muldoe (Gitludahl) who seems to be the only source of evidence of aboriginal use of a great number of territories. It will be remembered that quite recently he was the central figure in the amalgamation of 5 houses, including this one of Wiigyet, and it is understandable that he would have little occasion to use this territory now that he has acquired rights to other territories much closer and more convenient to Kispiox. The evidence rather suggests the burden of aboriginal use depends upon the activities of a few chiefs.

### 2. Wiigyet — Baskyatsinhlikit Territory

This small territory is across the Skeena River from the one just mentioned. There is no evidence this territory has been used except for one occasion when Mr. Muldoe shot one or more moose on it prior to 1954.

### 3. Wiigyet — Miinhl Gwogood (Mount Horetsky) Territory

This is an small territory which includes only the magnificent Mount Horetsky, elevation 5330', which rises in solitary splendour out of broad, verdant valleys and is a landmark visible for great distances. There is no specific evidence it has ever been used for aboriginal purposes.

### 4. Luus — Xsi Duutswit Territory

This is another territory in the Kuldo area which was described by Mr. Muldoe who says he hunted and trapped on this territory with Abel Tait (Luus) who died in 1946.

### 5. Gwiiyeehl — Xsi Git Gat Gaitan (Cullon Creek)

This territory is 12 miles north west of Kispiox. It was also described by Mr. Muldoe. There is no evidence of aboriginal use except some hunting by Mr. Muldoe. Some members of the house of Guiiyeehl have cabins on this territory, but there is no evidence what they do there.

### 6. Gwiiyeehl — Lip A'Heetxwit (Baldy Mountain)

This small territory is located about 30 miles north of Kispiox. Its circumstances are about the same as for the last mentioned territory of this House except there are no cabins here. Again, Mr. Muldoe has made one or two hunting trips into this area.

**7. Wii Elaast — Giist Territory**

This small territory is about 5 miles south of Kuldo. Mr. Muldoe says he has hunted on it, and passed over it on his way to Kuldo. It is unlikely the territory has been used since the 1950's.

**8. Wii Elaast — Waulp Territory**

This small territory is located about 11 miles north of Kispiox. Mr. Muldoe says it was used for hunting and some trapping years ago. He has not been on the territory for over 15 years, and it is unlikely it has been used for aboriginal purposes for upwards of 30 years.

**9. Geel — Lax Didax Territory**

This territory is located about 45 miles north of Kispiox in the Kispiox River valley. The evidence is inconclusive, based largely upon hearsay repeated by Mr. Muldoe who has not used the territory. It appears that large parts of this territory have not been used for upwards of 30 years.

**10. Geel — Luu Andilgan Territory**

There is evidence from Mr. Muldoe of occasional hunting and trapping on this territory which is about 40 miles north of Kispiox, but there is no detail as to when these activities took place.

**11. Antgulilbix — Xsi Wis An Skit (Upper Kispiox River)**

This territory is about 50 miles north of Kispiox on the Upper Kispiox River. Mr. Muldoe gave evidence about this territory as did Mary Johnson (Antgulilbix). Mr. Muldo has no personal knowledge of trapping on the territory since the 1930's although he was there once via small aircraft about 15 years ago when he saw a small cabin which no longer exists. Mary Johnson said she was there before she retired. She was 80 years when she gave her evidence in 1987. She says a part of this territory was given to her House as compensation for the murder of an earlier chief, Yeel, which, according to legend, occurred many years before the arrival of the white man.

**12. Antgulilbix — Andamhl Territory**

This territory was discussed in Part 17. It is located immediately west of the village of Kispiox. Indian legend describes a village called Wilt Gallii Bax on the mountain at Andamhl which was abandoned before Mrs. Johnson was born. There is evidence of occasional hunting, trapping and berry picking etc.

**13. Wii Minosik — Dam Sgan Djixit (Smokee Lake) Territory**

This small territory, northwest of Kuldo was described by Mr. Muldo although he seems never to have been on the territory. His travels in the vicinity were with Abel Tait who died in 1946. The old telegraph trail passes through this territory and there was a campsite, but there is no evidence of serious trapping or hunting.

**14. Wii Minosik — Gwin Dak Territory**

This territory is approximately 10 miles northwest of Kisgegas. It was described by James Morrison who has occasionally, and as recently as 1986, hunted goats in this area. While Mr. Morrison was formerly in a House claiming territories in this area, he is now a Kitwankool chief.

**15. Wii Gaak — An Gil Galanos And Xsu Wiki As (Sustat River)**

This huge territory stretches about 70 miles from east of Kisgegas to well north of the Sustat River. There is evidence of hunting and trapping prior to the mid 30's and hardly nothing since then except for an apparent revival of interest since the commencement of this action. Mr. Sterritt gave evidence about the northern part of this territory but said he was not on it between 1930 and 1984. Thomas Wright said he had been on the territory when he was about 12 years old, and that old houses there had all "rotted down."

There is some evidence of trapping by Thomas Jack at some time along the northern edge of the central area, and some second hand evidence about other minimal activities.

James Morrison trapped in the southern area as recently as 1956 or 1957 and Mr. Sterritt started to trap there in 1984. There is also scattered evidence of other activity on this territory "a long time ago."

**16. Tsabux — Tsim Gwi Dagantwit**

This is a small, mountain top territory (Shedin Peak, elevation 8250') 25 miles north of Kisgegas. There is only evidence of one mountain goat hunting expedition in 1957 or 1958.

**17. Tsabux — Lax An Hakw (Shelf Ridge) Territory**

This territory is immediately north of Kisgegas. There is no evidence this territory has been used except for hunting in the mountains prior to the 1960's. Mr. Morrison, however, said he had hunted on this territory in the 1980's.

**18. Tsa bux — Xsu Ahl Masxw (Red Creek) Territory**

Only the southernmost portion of this territory is within the aboriginal area I have defined. There is evidence that when Abel Sampson was 13 — 15 years old he hunted and trapped on some part of this territory with his father. This would have been in the late 1940's. The entire Bear Lake community was abandoned in the early 1950's. Mr. Sampson moved to Hazelton when he was 15 years and has not returned the territory since then. When asked why he left Bear Lake he replied:

> "The only reason how we can stay up there is from trapping. The trapping got so poor that they had a store up there, and pretty soon you can't afford to get the airplane in to pay for stuff and we had to move into town." (Exhibit 600A, pp. 23-4).

**19. Nii Kyap — Xsu Gwin Gyila'a (Squingula River)**

This territory is west of Bear Lake. There was trapping on this territory prior to 1950. Mr. Jack testified that he and others trapped there before they moved to Burns Lake in 1950. After that he returned for only two years and has not been back since. Joshua MacLean is the current holder of this name but he has never been to this territory.

**20. Miluulak — Xsi Adee'a (Sam Green) Territory**

Aboriginal activities on this territory, located near Kisgegas, depend upon the evidence of Robert Jackson Sr. who moved away from Kisgegas when he was 17 years and lived in Prince Rupert for many years, returning to Hazelton in 1979. While he was living at the coast he returned regularly to trap and hunt and he has done so since his return.

**21. Haiwas — Djil Djila (Driftwood Range) Territory**

What I said in No. 18 above, applies also to this territory.

**22. Gyologyet — Xaagan Gaxda (Kuldo Creek) Territory**

There is no evidence of activity on this territory since 1951. The chief claiming this territory, Mary MacKenzie, has never been on this or on the other 2 territories she claims.

### 23. Gyologyet — Xsana Lo'op (Shanalope Creek) Territory

Only part of this territory is in the aboriginal area. There is no specific evidence of use of this territory.

### 24. Djogaslee — Sagat Territory

This territory is about 10 miles south east of Hazelton. It is partly in an Indian Reserve. There is an old, abandoned Indian village on the territory, and there has been occasional berry picking but very little other activity.

### 25. Gwinin Nitxw — Maxhla Dida'at Territory

This large territory stretches from about 15 miles north east of Kuldo all the way north to the Skeena. Apart from some trapping prior to 1940, and some subsequent hunting in about one quarter of the territory, there is little, if any, evidence of aboriginal use.

### 26. Baskyelaxha — Angodjus (Poison Mountain) Territory

This territory is on the Skeena River 15 miles north of Kuldo. There is no evidence of aboriginal use.

### 27. Ma'uus — Gwiis Xsagan Gaxda (Kuldo Creek) Territory

There is evidence of use of this territory around 1916 or 1917, and subsequently, but nothing since about 1930.

### 28. Ma'uus — Xsa Gay Laaxan Territory

There is no evidence of aboriginal use of this territory apart from Martha Brown seeing Henry Brown trap on it before there was a farm there. Henry Brown was born in 1896 so it is likely his trapping occurred many years ago.

### 29. Gutginuxw — Lax Xsan Djihl Territory

There is an abandoned village site on this territory, possibly on an Indian reserve close to Kispiox. There is general evidence of undated fishing and berry picking, but little else.

### 30. Gyetem Galdoo — An Djam Lan Territory

At most, there is evidence of occasional hunting on this territory which is 15 miles east of Hazelton on the Suskwa River.

### 31. Spookw — Stekyawdenhl (Rocher de Boule) Territory

I discussed this territory in Part XVI. It is located about 3 miles east of Hazelton. There is hardly any evidence of aboriginal use. Perhaps its proximity to Hazelton explains this, but there are substantial forested areas on the lower slopes of Stekyoodem which could be used for this purpose. I suspect many Indians living in the Skeena villages might use this territory for hunting regardless of House claims to ownership.

### 32. Yagosip — Max Hla Gandit Territory

There is hardly any evidence of aboriginal use of this territory which is also situated close to Hazelton and Hagwilget.

### 33. Yagosip — An Guuxs Di Gehlx Territory

This territory is located about 15 miles north of Kispiox. There is no specific evidence of aboriginal use.

### 34. Nika Teen — Lax Lix Hatwit (Mount Glen) Territory

This is a small territory very close to Hazelton. It is unlikely that there would be aboriginal activities on this territory, and there is no evidence in that regard.

### 35. Nika Teen — Dam Gan Gyuuxs Territory

The same comments as made about the proceeding territory apply here.

### 36. Wii Goob'l — Sxa Galliixanwit (Sallysout Creek)

This territory is located about 30 miles north west of Kuldo. There is evidence of activity on this territory in the 30's, but no admissible evidence of any subsequent activities.

### 37. The Gitksan "Skeena Bulge"

There are 24 territories in what I call the "Skeena Bulge," which were all verified in the Territorial Affidavit of Stanley Williams (Gwis Gyen). Mr. Williams, like Mr. Muldoe was one of the most prominent Gitksan Chiefs. Unfortunately Mr. Williams was one of a number of Gitksan and Wet'suwet'en chiefs, who died during the course of the trial. He had previously given his evidence on Commission, and he was cross-examined on his Territorial Affidavit.

There are other territories in the "bulge" verified by other chiefs, but I think it will be convenient to group most of them together. To a large extent, the evidence about these territories was also given by Mr. Williams about his own activities much of which occurred a long time ago, although he remained very active as a hunter up to the time of trial. His evidence is sprinkled with references to hunting with persons long since deceased, such as with William Holland on one of the territories of Haalus. William Holland died in 1932. In the case of the Gasa Lax Lo'Obit Territory, counsel for Canada says:

> "There is no evidence before the Court of any Plaintiffs' presence on the territory after Simon Turner died in 1947."

The evidence about use of Lelt's Xsu Gwin Aaxwit (Quill Creek) Territory seems to be confined to the period prior to the death of Solomon Harris in 1938. There is evidence of trapping on Gwag'lo's Miinhl Deekwit Territory prior to 1947. The evidence about use of Gwag'lo's Xsi Noon (Deep Canyon Creek) Territory is limited to a statement by Mr. Hyzims that Henry and Albert Wilson trapped there, but Mr. Hyzims has not been on the territory.

### 38. Hanamuxw — Xsuwii Luu Negwit (Kitsuns Creek) Territory

This territory is about 4 miles south of Kitsegukla. Mrs. Ryan (Gwans) described this territory on behalf of this House of which she is a prominent member. She has not been on this territory since she was 10 years old. She was 72 when she gave her evidence at trial. She said others had used the territory.

The foregoing are by no means all of the Gitksan territories. I have not mentioned those which are north of the aboriginal boundary line I have drawn across the northern part of the territory, and I have not included those territories where there is some evidence of recent aboriginal activities. Even in the case of many of those territories, the evidence is sparse confirming my impression that this is a very empty land.

## 3. Wet'suwet'en Territories

### 1. Gisdaywa — Benwenii Ben (Owen Lake) Territory

Most of this territory seems to have been abandoned around 1931 when the Joseph family moved to Hagwilget. Since then there has only been some trapping by cousins (in the south-west), and occasional visits since Mr. Alfred Joseph became chief in 1974. Mr. McIntyre of the Department of Indian Affairs, who had responsibility for the Felix George Indian Reserve on this territory said he never saw anyone living at Owen lake or on the reserve.

### 2. Madeek — Bex C'Ediil Yiiz Territory

This territory is about 25 miles south of Smithers. There is no evidence it has been used for aboriginal purposes. There was evidence, however, about a cabin on this territory occupied by Houston Tommy who was there when Mr. Alfred Joseph was very young. It is not know how long Houston Tommy remained on the territory.

### 3. Woos — Woos (Smithers Area) Territory

This area includes the village of Smithers which is the largest non-Indian community in the territory. There is a large registered trapline in the territory south of Smithers which was once used by Jean Baptiste but it has not been used since 1951. Considering the development of Smithers, a substantial reduction of aboriginal activity in the are is not surprising, but it is a very large territory with much unoccupied land.

### 4. Woos — Xeel Tats'Eliiyh (Upper Harold Price Creek)

This area is about 15 miles north east of Smithers. The evidence suggest Alfred Mitchell hunted in this area up to 3 or 4 times prior to 1955.

### 5. Kweese — Taldzee Weyeez (Shea lake) Territory

This mountainous territory is on the westerly external boundary about 30 miles south west of Smithers. It was once used for hunting and trapping by Mooseskin Johnny, an ancestor of the present chief Florence Hall (Kweese). There is limited evidence of aboriginal use since the death of Mooseskin Johnny in 1930, or at least after 1937. Mrs. Hall was not on the territory from 1937 to 1962, and only infrequently since then.

### 6. Kweese — Sdeets'Eneegh (Elwyn Lake) Territory

The last known resident on this territory was August Pete who died in 1952. He operated a farm on a part of this territory which may not have been an aboriginal activity, but he undoubtedly did some hunting and fishing if not trapping in addition to running his farm. Florence Hall and her family lived here until August Pete pre-empted some land. Her father worked as a section hand on the CNR until he was laid off many years ago and the family returned to live at Walcott which is between Telkwa and Houston.

### 7. Smogelgem — Cees Ng'Heen (Harold Price Creek)

There has been no trapping on this territory for about 25 years, but some moose hunting.

### 8. Smogelgem — C'Edii Toostaan (McQuarrie Lake) Territory

This territory is just south of Smithers. There was trapping on this territory prior to 1953, and there are traplines on this territory but they do not seem to be in active use.

### 9. Smogelgem — Mesdzii Kwe (Parrott Creek) Territory

This territory is about 45 miles south of Smithers. There is no evidence it has been used for aboriginal purposes.

### 10. Smogelgem — Gguusgii Bewenii (Perow) Territory

This territory is also south west of Smithers. There is only general evidence from which an inference of recent aboriginal use could not easily be made.

### 11. Smogelgem — Loox Kwe (Uyenii) (Clore Creek) Territory

This relatively small territory includes the easterly edge of the coastal mountains and the south westerly external boundary about 50 miles from Smithers. There was only one trap line on this territory which an Indian woman sold in 1940. A non-Indian has held this trap line since 1945. The Territorial affiant had only been on the territory once, in 1938. He deposed that this territory is sometimes said to belong to Klo Um Khun who is a chief of the same clan as Smogelgem and he believes the territory belongs to the latter.

### 12. Samooh — Guzeyh Keeyex (Gilmour Lake) Territory

This small territory is 35 miles south-east of Smithers. There is only meagre evidence about it, but it seems a portion of a trap line covering part of this territory was sold by an Indian to a white person in the 1930's. There is no specific evidence of recent use. It is interesting that, in addition to claiming this small territory, Samooh also claims a large territory in the far south west corner of the territory.

### 13. Hagwilnegh — Tsee Zuul (China Nose Mountain) Territory

The only evidence of aboriginal use of this territory is the statement of Johnny David that he and his father trapped in this general area. His father died in 1908.

### 14. Wah Tah Kwets — Coos Tl'aat (Round Lake) Territory

This territory is just south of Telkwa, and is bisected by the transportation corridor. There is remarkably little evidence of aboriginal use. Round Lake Tommy moved away years ago to farm at Barrett Lake, and there is a decided conflict in the evidence about presence on the territory. Canada says Pat Namox, brother of John Namox (Wah Tah Kwets), said he had not been on this territory for about 60 years, while the plaintiffs say in argument that he has travelled on the territory recently. Peter Jim, a member of the House holds a trap line on the territory but there is no evidence of when it was last used.

### 15. Wah Tah Kwets — Neeldzii Ciik (Houston) Territory

This territory surrounds the non-Indian village of Houston. Lucy Bazil described how her parents used this land before her father died and her mother moved to Moricetown in 1941. Even before that time she said she could not remember "anyone being there" Later, however, she said "just anybody" used the territory but this was again qualified to members of the House, although there were exceptions. The plaintiff's point out that the development of the Village of Houston, where there is a very large sawmill, may be the cause of the limited use of this territory.

As with the Gitksan, I have only commented on those territories within the aboriginal area where an argument could be made that the territory has been abandoned.

I have no doubt aboriginal activities have fallen very much into disuse in many areas. This was admitted by several Indian witnesses who observed that many of their young people have very little interest in aboriginal pursuits. The aboriginal activities that are being pursued now may be indistinguishable in many cases from the wilderness activities enjoyed by many non-Indian citizens of the province.

## 4. Conclusions on Abandonment

While recognizing that a right which is not used can be treated as abandoned, the law does not like the principle because it lacks certainty. It also requires the Court to look objectively at what may well be a subjective state of mind. Have the plaintiffs abandoned use in the sense that they must be taken by their actions, or inactions, to have given it up?

While this case is very close to the line, and I do not think there is very much aboriginal activity in the territory, I do not think I can safely conclude that the intention to use these lands for aboriginal purposes has been abandoned even though many Indians have not used them for many years. This is an issue where the onus of proof rests upon the defendants, and I cannot overlook the facts, firstly, that there are several thousand Gitksan and Wet'suwet'en persons in the territory, and secondly my understanding of these peoples, as I have come to know them, is that many of them do indeed still hunt and fish and pick berries in season.

Understandably, they were not all called to give evidence at the trial, and although some of the elders and chiefs who have been managing this litigation may be resting in the villages where they live, others such as Art Mathews Jr. are still participating in aboriginal activities. On the occasion of my visit to Tenimgyet's smoke house in June 1988 I noticed his elderly father Art Mathews Sr. had a small gill net out in the Skeena with several sockeye salmon already caught. On the same trip I visited Glen William's smoke house at the back of his modern home in Kitwangak where I had an opportunity to sample the salmon he was curing.

The proper application of the principle of abandonment would require me specifically to delineate the precise areas abandoned. This would create an unworkable patchwork even more unrealistic than the internal boundaries. I do not think the evidence of abandonment is sufficiently precise to permit so many fine distinctions.

In my view, it would be unsafe, and contrary to principle, to apply the principle of abandonment to such an uncertain body of evidence. It may be noted, however, that limited use of the territories bears on the question of honourable reconciliation which I have already mentioned in Part 15.

## PART 19

# OTHER DEFENCES

The province argued that the plaintiffs, by accepting and using reserves, and by conforming generally with the law of the province, have given up their aboriginal rights. Alternatively, it was argued that throughout this entire history Canada has, on behalf of the Indians, bound them by constitutional arrangements and agreements with the province. The province, particularly relies upon the 1924 full and complete settlement mentioned in PC 1265 which acknowledges the "... full and final adjustment and settlement of all differences between the [said] governments respecting Indians and Indian lands in the province." The province argues this constitutes a Release in favour of the province of all of the plaintiffs' claims.

That this is so could be argued from the dicta of Judson J. in Calder where, he said:

> "Nevertheless, the federal authority did act under its powers under s. 91 (24) of the B.N.A. Act. It agreed, **on behalf of the Indians,** with the policy of establishing these reserves." (my emphasis)

With respect, it is not necessary to disagree with the foregoing to conclude, as I do, that the consideration for reserves, at best, was village sites, not user rights to lands beyond the villages. Further, the agreement between the province and the federal authority to adjust reserves in this century was clearly recognized by the parties themselves as an agreement only about reserves, and the Commissioners, who represented both levels of government, made representations to the Indians of the territory that their rights additional to reserves, if any, were not the subject of their proceedings. In fact, it was expressly stated those questions would be resolved in Court where we now are. The honour of the Crown precludes me from giving effect to this defence. In my judgment, the plaintiffs have not directly or indirectly released their causes of action.

Similarly, I do not find, as a matter of law, that the acceptance by the plaintiffs of British Columbia law, or conformity with it, precludes them from advancing their claims for aboriginal interests. In my view, the Indians' claims have not been discharged by any conduct on their part.

## PART 20

# THE COUNTERCLAIM OF THE PROVINCE

The dismissal of all the plaintiffs' claims except the declaration of fiduciary duty greatly reduces the scope of the Counterclaim.

Relying upon the provisions of the Constitution, the Terms of Union and subsequent arrangements between Canada and the province such as PC 1265, the province argues that the plaintiffs' claims are the responsibility of Canada under Clause 1 of the Terms of Union by which Canada assumed responsibility "... for the debts and liabilities of British Columbia existing at the time of Union."

From this, the province argues, the plaintiffs' only possible claim is against Canada for compensation.

I shall deal with the two parts of the Counterclaim separately.

First, the province claims a declaration against the plaintiffs that they have no right or interest in and to the territory. While I agree that the benefit of the fiduciary obligation I have found may not be a right or interest in the land of the territory, that does not entitle the province to the declaration it seeks. The dismissal of all of the plaintiffs' claims except for the declaration of fiduciary duty makes such relief under this paragraph of the Counterclaim unnecessary.

Secondly, the province claims a declaration that the "... plaintiffs' cause of action, if any, in respect of their alleged aboriginal title, right or interest in and to [the territory] is for compensation from ... Canada." This result, the province argues, flows from the constitutional instruments.

What the province is saying is that the plaintiffs cannot succeed against the province in any respect, and that if they had such a claim at the date of Confederation it must, because of the constitutional arrangements between Canada and the province, be pursued as a claim for compensation from Canada.

With respect, I cannot accept that submission. The plaintiffs' claim is not for compensation but for the right to require the Crown to keep its promise to permit them to use the vacant land of the territory. It has the Crown's promise to that effect which can only be enforced against the province. If the province wishes to be indemnified with respect to this liability, or to seek contribution from Canada, it must do so in proceedings against Canada, not by directing the plaintiffs into new causes of action.

I would dismiss the Counterclaim.

## PART 21

# THE JUDGMENT IN THIS CASE

The foregoing answers the legal issues arising for decision in this case. It remains only to state my conclusions in more precise form and to add some comments. Nothing I have said applies in any way to any lands set aside as Indian reserves.

(1) The action against Canada is dismissed.

(2) The plaintiffs' claims for ownership of and jurisdiction over the territory, and for aboriginal rights in the territory are dismissed.

(3) The plaintiffs, on behalf of the Gitksan and Wet'suwet'en people described in the Statement of Claim (except the Gitksan people of the Houses of the Kitwankool chiefs), are entitled to a Declaration that, subject to the general law of the province, they have a continuing legal right to use unoccupied or vacant Crown land in the territory for aboriginal sustenance purposes as described in Part 15 of these Reasons for Judgment.

(4) The plaintiffs' claims for damages are dismissed.

(5) The Counterclaim of the province is dismissed.

(6) In view of all the circumstances of this case, including the importance of the issues, the variable resources of the parties, the financial arrangements which have been made for the conduct of this case (from which I have been largely insulated), and the divided success each party has achieved, there will not be any order for costs.

# PART 22

# SOME COMMENTS

Having spent nearly four years considering these important questions I hope I may be forgiven for adding these brief comments.

I have already said that I do not expect my judgment to be the last word on this case. I expect it to be appealed and I do not presume to suggest what course the parties should follow from this point forward.

Assuming that discussions between both governments and the Indians will continue, I respectfully offer the following for their consideration.

The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty, and "rights," which are fascinating legal concepts. Important as these questions are, answers to legal questions will not solve the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times.

Indians have had many opportunities to join mainstream Canadian economic and social life. Some Indians do not wish to join, but many cannot. They are sometimes criticized for remaining Indian, and some of them in turn have become highly critical of the non-Indian community.

This increasingly cacophonous dialogue about legal rights and social wrongs has created a positional attitude with many exaggerated allegations and arguments, and a serious lack of reality. Surely it must be obvious that there have been failings on both sides. The Indians have remained dependent for too long. Even a national annual payment of billions of dollars on Indian problems, which undoubtedly ameliorates some hardship, will not likely break this debilitating cycle of dependence.

It is my conclusion, reached upon a consideration of the evidence which is not conveniently available to many, that the difficulties facing the Indian populations of the territory, and probably throughout Canada, will not be solved in the context of legal rights. Legal proceedings have been useful in raising awareness levels about a serious national problem. New initiatives, which may extend for years or generations, and directed at reducing and eliminating the social and economic disadvantages of Indians are now required. It must always be remembered, however, that it is for elected officials, not judges, to establish priorities for the amelioration of disadvantaged members of society.

Some Indians say they cannot live under the paternalism and regulation of the **Indian Act,** but neither can many of them live without the benefits it provides. Some Indians object to the imposed Band structure created by the **Act** but it would be foolish to discard it until something acceptable to a majority of the Indians has been fashioned to take its place.

Clearly a new arrangement is required which should be discussed between both levels of government with the Indians other than in the context of land claims. The first priority should be for the two communities to find out what they expect of each other. In a successful, ongoing relationship, there must be performance on both sides.

This, however, should not be considered an endorsement for "self government" because details are required before any informed opinion may be given. Too often, catchy phrases gain quick recognition, momentum and even acceptance without a proper understanding of the real meaning or consequences of these sometimes superficial concepts. Also, different arrangements might be appropriate for different areas and the desired result may sometimes best be attained in stages.

Compared with many Indian Bands in the province, the Gitksan and Wet'suwet'en peoples have already achieved a relatively high level of social organization . They have a number of promising leaders, a sense of purpose and a likely ability to move away from dependence if they get the additional assistance they require. I cannot, of course, speak with confidence about other Indian peoples because I have not studied them. I am impressed that the Gitksan and Wet'suwet'en are ready for an intelligent new arrangement with both levels of government.

I am not persuaded that the answers to the problems facing the Indians will be found in the reserve system which has created fishing footholds, and ethnic enclaves. Some of these reserves in the territory are so minuscule, or abandoned, that they are of little or no use or value. On the other hand, it is obvious that some village reserves should have been larger but there is no profit in trying to assign blame for this. The solution to problems facing Indians will not be solved by another attempt to adjust reserves because that system has been tried and it has failed, and there are other ways to correct that historical failure.

It must be recognized, however, that most of the reserves in the territory are not economic units and it is not likely that they can be made so without serious disruption to the entire area which would not be in the best interest of anyone, including the Indians. Eventually, the Indians must decide how best they can combine the advantages the reserves afford them with the opportunities they have to share and participate in the larger economy, but it is obvious they must make their way off the reserves. Whether they chose to continue living on the reserves is for them to decide. Care must always be taken to ensure that the good things of communal life are not sacrificed just on economic grounds. As Mr. Sproat predicted in 1876, it may still be necessary to "... persevere, if need be, through a succession of failures."

In any new arrangement, some failures must be expected but we should at least be able to identify them. The worst thing that has happened to our Indian people was our joint inability to react to failure and to make adjustments when things were not going well. As social improvement can only be measured in generations, the answer to these social questions, ultimately, will be found in the good health and education of young Indian people, and the removal of the conditions that have made poverty and dependence upon public funding their normal way of life.

There must, of course, be an accommodation on land use which is an ongoing matter on which it will not be appropriate for me to offer any comment except to say again that the difficulties of adapting to changing circumstances, not limited land use, is the principal cause of Indian misfortune.

Lastly, I wish to emphasize that while much remains to be done, a reasonable accommodation is not impossible. After the last appeal, however, the remaining problems will not be legal ones. Rather they will remain, as they have always been, social and economic ones.

Smithers, and
Vancouver, B.C.
March 8, 1991.

C.J.B.C.

## INDEX OF SCHEDULES TO REASONS FOR JUDGMENT

Schedule 1. Itinerary of view of territory June, 1988 .................................. 305
Schedule 2. Description of plaintiffs, from Amended Statement of Claim ............... 308
Schedule 3. Copy of Royal Proclamation, 1763......................................... 311
Schedule 4. Extract of submission of province on oral histories......................... 315
Schedule 5. Territorial Affidavit of William Blackwater, (Ex. 605) ..................... 331
Schedule 6. Summaries of Territorial Arguments ...................................... 341

## SCHEDULE 1

I took the first six weeks of evidence in May-June 1987 at Smithers, a community situated in the Bulkley Valley in approximately the centre of the territory. Smithers is a community of about 7,000 persons, mainly of European descent, who have made the Bulkley Valley into a fertile farming and dairy region. Smithers is on the main line of the northern transcontinental C.N.R. Railway and it is also on Highway 16 which is sometimes known as the Yellowhead Highway which traverses generally westerly from Edmonton through the Rocky Mountains by the Yellowhead Pass to Prince George and then northwesterly through Burns Lake, Smithers, Hazelton, Terrace and ultimately to the Pacific coast at Prince Rupert. During my six weeks in Smithers in May and June of 1987 I usually took advantage of the long spring evenings to visit various areas in the territory including several trips to each of Kitwancool, Gitwangaak, Kitsegulka, Kispiox, the Hazeltons and Houston, plus evening trips by private logging roads to Smithers Landing on Babine Lake, Fulton and Topley Landing, and a single trip to Burns Lake. In this way I gained a good appreciation of the Bulkley and Skeena River corridors and their villages where at least 90% of the residents of the area, including most of the Gitksan and Wet'suwet'en, make their homes.

During the course of the trial I have, of course, been exposed to countless maps and photographs which describe the topography and important landmarks in the territory.

Then, on June 6 and 7, 1988, at the request of and accompanied by counsel in one helicopter, and by three Chiefs and a forester representing the Provincial Department of Forestry in a second helicopter, I was taken to and shown many of the remote northerly and southerly portions of the territory. On June 6th we visited the northern territories claimed by the Gitksan people and Mr. Neil Sterritt, a Gitksan Hereditary Chief, provided us with a running commentary on the important landmarks. On June 7th we visited the areas claimed by the Wet'suwet'en people and Mr. Alfred Joseph, a Wet'suwet'en Hereditary Chief, was our principal tour guide.

On June 8, 1988, again accompanied by counsel, I motored down the Skeena River from K'san (Old Hazelton) to Kitwanga and beyond where many of the fishing sites I heard about in the evidence were pointed out to me.

Before I describe the magnificent country we viewed, I wish to say that no one can gain a proper appreciation of the overwhelming vastness and isolation of this magnificent but almost empty territory without spending at least the amount of time I spent there. I also wish to add that I wish I could have spent more time in the territory but helicopter travel is very expensive and although logging roads are pushing further and further into the territory, they are not always available for private traffic, and exploration by land in such country is a long, slow, tedious and often uncomfortable enterprise.

On June 6th we started at Smithers and after a short detour to the west to avoid clouds in the Debenture Peak area, we travelled north about 10 miles east of the westerly external boundary of the territory, past French Peak and Mt. Horetzky (where we were unable to land because of bad weather) to Kotsine Mountain, where we stopped near its peak in a driving rainstorm to make observations of the Babine Range to the southeast and other landmarks of interest. We swung east along the Kotsine River around the south end of the Driftwood Range and then turned north along the right-of-way of the Dease Lake extension of the B.C. Railway (where track is said to be in "horizontal storage" as this line has been abandoned for some years) until we landed again at The Thumb west of Comb Peak which overlooks Bear Lake. We then flew north-westerly to an abandoned airstrip of a B.C. Rail contractor just north of the Sustut River where there was a fuel cache. We then proceeded generally in a westerly direction along the Sustut to its confluence with the Skeena where we left the B.C. Rail right-of-way, which continues north towards its unfortunate destiny at Dease Lake. We continued westerly along the Skeena. On this leg of our voyage of exploration we passed but did not stop at the ancient but now totally deserted village of Gitengas where there are no buildings still standing. We then left the Skeena and went north up the Slamgeesh River where we stopped for lunch at a point on the old Telegraph Trail where Chief William Backwater was born and grew up. There are no residents there now and only a few grave buildings and one small, totally uninhabitable building remains. We then flew south to rejoin the Skeena and then westerly along Steep Canyon Creek over the height of land at its source and then northward along Vile Creek, the Nass and Bell-Irving Rivers into the northwest corner of the territory where we were within 20 miles or so of Stewart on the Alaska border. After stopping there we turned south along the other side of the wide valley that accommodates Highway 37, crossing Bowser Lake, which has the same glacial colour as Lake Louise, and stopped for fuel in the land of the Kitwancool chiefs and Meziadian Lake.

We then proceeded south through the lake area to the west of Fred Wright Lake and then east along Canoe Creek and then north along the Skeena past New Kuldo which is a completely deserted clearing on the banks of the Skeena with no visible buildings. A few miles further north we stopped at Old Kuldo to examine the site of this ancient village. Old Kuldo, also a clearing on the west bank of the Skeena, is now completely deserted with no visible buildings but we were shown what appears to be a man-made canal by which water from a mountainous stream was diverted past the village into the Skeena.

We then flew a short distance east and then swung south down Shedin Creek to the confluence of the Babine and Skeena Rivers, which is the site of the ancient village of Kisgegas, which was once the largest of the Skeena villages. It is a large cleared area with the remains of a number of buildings including an almost fallen-down church built around 1930 but all the residents have left here although there are a few cabins on the other side of the river which I understand are occupied for part of the year by Josuah McLean. Access to Kisgagas is now possible by logging road from Kispiox but, except for the fish runs in the summer, the village has been largely empty since the 1940's.

We then flew a short distance east along the Babine River which is said to be prime steelhead and salmon territory, and then west back to the Babine's confluence with the Skeena, whose course we followed southward past Kispiox (which is situated at the confluence of the Kispiox and Skeena Rivers) and then we continued southward along the Skeena to its confluence with the Bulkley River at Hazelton (K'san) and then further south along the east bank of the Skeena in the shadow of Rocher de Boule Mountain (Stickyotum) where we were able to observe the alleged site of the ancient historical village of Tamlehamid where Mr. Neil Sterritt now has a farm. When we reached the native village of Kitsequecla we stopped for fuel. We then proceeded southeast up the Kitsequecla River behind Rocher de Boule, past the magnificent Secugla Mountain, and past Kitsequecla Lake until we re-entered the rich Bulkley Valley on the south side of mighty Hudson Bay Mountain where the Bulkley River flows north, but we turned south up the valley to Smithers where we terminated a fascinating voyage of exploration and discovery.

We began our tour of the Wet'suwet'en country on June 7, 1988, using the same format as the previous day except that Mr. Alfred Joseph was the principal tour guide. We started again at Smithers and flew south-easterly along Highway 16 past Round Lake and along the north edge of the Bulkley Valley to Tachak Mountain where we were unable to land because of low cloud. We then turned south over Bowman Lake and then further south and then westerly to Sam Goosely Lake where we stopped and examined the remains of the cabin built in 1933 by Pat Namox which, even at this time, was the only habitation left at the village on the lake. We observed the "footprints" described in the evidence of Albert Mitchell. We then flew south and west, crossing Francois Lake and then across the rolling hills of the Grassy Plains area to Ligiliyvz where we turned west and flew past Skin Lake to the north shore of Ootsa Lake which we followed to the spillway where we stopped for lunch. We then proceeded westerly along the north shore of Ootsa Lake to Windy Point where the lake swings south into the Whitesail Reach but we proceeded west past the Shelford Hills to the north of Shibola Peak where we were unable to land. We then swung northeast, past Nadina Mountain, and landed at Pack Lake, where the Holland family had their cabins, but which have been deserted since the late 1940's, although they still return there for camping and trapping.

We then flew north-westerly between Owen Lake on the east and the magnificent Nadina Mountain on the west over the Equity Silver Mine to the Morice River where we swung south past McBride Lake and then west to the north end of Morice Lake where we stopped at the fire lookout station at the very top of Nanika Mountain. From there one obtains a magnificent view of the north end of Morice Lake, the verdant Morice Valley to the west and Telkwa Mountains to the north. All of the territories we visited and flew over are claimed by the various Houses of the Wet'suwet'en.

After leaving Nanika Mountain we flew west over to Herd Dome Mountain and then north past Burnie Lake and over the top of the incredible Telkwa Range, across the Telkwa River and then further to the north between McDonell Lake and Hudson Bay Mountain and then around that magnificent peak swinging east and south back to Smithers.

I am informed we were able to see about two-thirds of the territory on these three days of travel.

## SCHEDULE 2

## FURTHER AMENDED STATEMENT OF CLAIM

1. The Plaintiff, DELGAMUUKW, is the hereditary Chief of the House of DELGAMUUKW, and is bringing this action on behalf of himself and the members of the Houses of DELGAMUUKW and HAAXW.

2. The Plaintiff, GISDAY WA. is the hereditary Chief of the House of GISDAY WA, and is bringing this action on behalf of himself and the members of the House of GISDAY WA.

3. The Plaintiff, NII KYAP in the hereditary Chief of the House of NII KYAP, and is bringing this action on behalf of himself and the members of the House of NII KYAP.

4. The Plaintiff, LELT, is the hereditary Chief of the house of LELT, and is bringing this action on behalf of himself and the members of the Houses of LELT and HAAK'W.

5. The Plaintiff, ANTGULILBIX, is the hereditary Chief of the House of ANTGULILBIX, and is bringing this action on behalf of herself and the members of the House of ANTGULILBIX.

6. The Plaintiff, TENIMCYET, is the hereditary Chief of the House of TENIMGYET, and is bringing this action on behalf of himself and the members of the House of TENIMGYET.

7. The Plaintiff, GOOHLAHT, is the hereditary Chief of the House of GOOHLAHT, and is bringing this action on behalf of herself and the members of the Houses of GOOHLAHT and SAMOOH.

8. The Plaintiff, KLIIYEM LAX HAA, is the hereditary Chief of the House of KLIIYEM LAX HAA, and is bringing this action on behalf of herself and the members of the Houses of KLIIYEM LAX HAA and WII'MUGULSXW.

9. The Plaintiff, GWIS GYEN, is the hereditary Chief of the House of GWIS GYEY and is bringing this action on behalf of himself and the members of the House of GWIS GYEN.

10. The Plaintiff, KWEESE, is the hereditary Chief of the House of KWEESE, and is bringing this action on behalf of herself and the members of the House of KWEESE.

11. The Plaintiff, DJOGASLEE, is the hereditary Chief of the House of DJOGASLEE, and is bringing this action on behalf of himself and the members of the House of DJOGASLEE.

12. The Plaintiff, GWAGL'LO, is the hereditary Chief of the House of GWAGL'LO, and is bringing this action on behalf of himself and the members of the House of GWAGL'LO and DUUBISXW.

13. The Plaintiff, GYOLUGYET, is the hereditary Chief of the House of GYOLUGYET, and is bringing this action on behalf of herself and the members of the House of GYOLUGYET.

14. The Plaintiff, GYETM GALDOO, is the hereditary Chief of the House of GYETM GALDOO, and is bringing this action on behalf of himself and the members of the houses of GYETM GALDOO and WII'GOOB'L.

15. The Plaintiff, HAAK ASXW, is the hereditary Chief of the House of HAAK ASXW, and is bringing this action on behalf of himself and the members of the House of HAAK ASWX.

16. The Plaintiff, GEEL, is the hereditary Chief of the House of GEEL, and is bringing this action on behalf of himself and the members of the House of GEEL.

17. The Plaintiff, HAALUS, is the hereditary Chief of the House of HAALUS, and is bringing this action on behalf of himself and the members of the House of HAALUS.

18. The Plaintiff, WII HLENGWAX, is the hereditary Chief of the House of WII HLENGWAX, and is bringing this action on behalf of himself and the members of the House of WII HLENGWAX.

19. The Plaintiff, LUUTKUDZIIWUS, is the hereditary Chief of the House of LUUTKUDZIIWUS, and is bringing this action on behalf of himself and the members of the House of LUUTKUDZIIWUS.

20. The Plaintiff, MA'UUS, is the hereditary Chief of the House of MA'UUS, and is bringing this action on behalf of himself and the members of the House of MA'UUS.

21. The Plaintiff, MILUU LAK, is the hereditary Chief of the House of MILUU LAK, and is bringing this action on behalf of herself and the members of the Houses of MILUU LAK and HAIWAS.

22. The Plaintiff, NIKA TEEN, is the hereditary Chief of the House of NIKA TEEN, and is bringing this action on behalf of himself and the members of the House of NIKA TEEN.

23. The Plaintiff, SKIIK'M LAX HA, is the hereditary Chief of the House of SKIIK'M LAX HA, and is bringing this action on behalf of himself and the members of the House of SKIIK'M LAX HA.

24. The Plaintiff, WII MINOSIK, is the hereditary Chief of the House of WII MINOSIK, and is bringing this action on behalf of himself and the members of the House of WII MINOSIK.

25. The Plaintiff, GWININ NITXW is the hereditary Chief of the House of GWININ NITXW, and is bringing this action on behalf of himself and the members of the House of GWININ NITXW.

26. The Plaintiff, GWOIMT, is the hereditary Chief of the House of GWOIMT, and is bringing this action on behalf of herself and the members of the Houses of GWOIMT and TSABUX.

27. The Plaintiff, LUUS, is the hereditary Chief of the House of LUUS, and is bringing this action on behalf of himself and the members of the House of LUUS.

28. The Plaintiff, NIIST, is the hereditary Chief of the House of NIIST, and is bringing this action on behalf of himself and the members of the Houses of NIIST and BASKYELAXHA.

29. The Plaintiff, SPOOKW, is the hereditary Chief of the House of SPOOKW, and is bringing this action on behalf of himself and the members of the Houses of SPOOKW and YAGOSIP.

30. The Plaintiff, WII GAAK, is the hereditary Chief of the House of WII GAAK, and is bringing this action on behalf of himself and the members of the House of WII GAAK.

31. The Plaintiff, DAWAMUXW, is the hereditary Chief of the House of DAWAMUXW, and is bringing this action on behalf of himself and the members of the House of DAWAMUXW.

32. The Plaintiff, GITLUDAHL, is the hereditary Chief of the House of GITUDAHL, and is bringing this action on behalf of himself and the members of the Houses of GITLUDAHL and WIIGYET.

33. The Plaintiff, GUXSAN, is the hereditary Chief of the House of GUXSAN, and is bringing this action on behalf of himself and the members of the House of GUXSAN.

34. The Plaintiff, HANAMUXW, is the hereditary Chief of the House of HANAMUXW, and is bringing this action on behalf of herself and the members of the House of HANAMUXW.

35. The Plaintiff, YAL, is the hereditary Chief of the House of YAL, and is bringing this action on behalf of himself and the members of the House of YAL.

36. The Plaintiff, GWIIYEEHL, is the hereditary Chief of the House of GWIIYEEHL, and is bringing this action on behalf of himself and the members of the House of GWIIYEEHL.

37. The Plaintiff, SAKXUM HIGOOKX, is the hereditary Chief of the House of SAKXUM HIGOOKX, and is bringing this action on behalf of himself and the members of the House of SAKXUM HIGOOKX.

38. The Plaintiff, MA DEEK, is the hereditary Chief of the House of MA DEEK, and is bringing this action on behalf of himself and the members of the House of MA DEEK.

39. The Plaintiff, WOOS, is the hereditary Chief of the House of WOOS, and is bringing this action on behalf of himself and the members of the House of WOOS.

40. The Plaintiff, KNEDEBEAS, is the hereditary Chief of the House of KNEDEBEAS, and is bringing this action on behalf of herself and the members of the House of KNEDEBEAS.

41. The Plaintiff, SMOGELGEM, is the hereditary Chief of the House of SMOGELGEM, and is bringing this action on behalf of himself and the members of the House of SMOGELGEM.

42. The Plaintiff, KLO UM KHUN, is the hereditary Chief of the House of KLO UM KHUN, and is bringing this action on behalf of himself and the members of the House of KLO UM KHUN.

43. The Plaintiff, HAG WIL NEGH, is the hereditary Chief of the House of HAG WIL NEGH, and is bringing this action on behalf of himself and the members of the House of HAG WIL NEGH.

44. The Plaintiff, WAH TAH KEG'HT, is the hereditary Chief of the House of WAH TAH KEG'HT, and is bringing this action on behalf of himself and the members of the House of WAH TAH KEG'HT.

45. The Plaintiff, WAH TAH KWETS, is the hereditary Chief of the House of WAH TAH KWETS, and is bringing this action on behalf of himself and the members of the House of WAH TAH KWETS.

46. The Plaintiff, WOOSIMLAXHA, is the hereditary Chief of the House of WOOSIMLAXHA, and is bringing this action on behalf of himself and the members of the House of GUTGINUXW.

47. The Plaintiff, XSGOGIMLAXHA, is the hereditary Chief of the House of XSGOGIMLAXHA, and is bringing this action on behalf of himself and the members of the House of XSGOGIMLAXHA.

48. The Plaintiff, WIIGYET, is the hereditary Chief of the House of WIIGYET, and is bringing this action on behalf of himself and the members of the House of WIIGYET.

49. (A) The Plaintiff, WII ELAAST, is the hereditary Chief of the House of WII ELAAST, and is bringing this action on behalf of himself and the members of the Houses of WII ELAAST and AMAGYET.

49. (B) The Plaintiff, GAXSBGABAXS, is the hereditary Chief of the House of GAXSBGABAXS, and is bringing this action on behalf of herself and the members of the House of GAXSBGABAXS.

49. (C) The Plaintiff, WIGETIMSCHOL, is the hereditary Chief of the House of NAMOX and is bringing this action on behalf of himself and the members of the House of NAMOX.

## SCHEDULE 3

### 1763, October 7
### [Establishing New Governments in America]

## BY THE KING

## A PROCLAMATION

George R.

PART I A Whereas We have taken into Our Royal Consideration the PREAMBLE extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace,

B concluded at Paris the Tenth Day of February last; and being desirous, that all Our loving Subjects, as well of Our Kingdoms as of Our Colonies in America, may avail themselves, with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to

1) their Commerce, Manufactures, and Navigation; We have thought fit, with the Advice of Our Privy Council, to issue this Our Royal Proclamation, hereby to publish and

C declare to all Our loving Subjects, that We have, with the Advice of Our said Privy Council, granted Our Letters Patent under Our Great Seal of Great Britain, to erect within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, stiled and called by the Names of Quebec, East Florida, West Florida, and Grenada, and limited and bounded as follows; viz.

2) D First. The Government of Quebec, bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John to the South End of the Lake nigh Pissin, from whence the said Line crossing the River St. Lawrence and the Lake Champlain in Forty five Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence, from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

3) E Secondly. The Government of East Florida, bounded to the Westward by the Gulph of Mexico, and the Apalachicola River; to the Northward, by a Line drawn from that Part of the said River where the Chatahouchee and Flint Rivers meet, to the Source of St. Mary's River, and by the Course of the said River to the Atlantick Ocean; and to the Eastward and Southward, by the Atlantick Ocean, and the Gulph of Florida, including all Islands within Six Leagues of the Sea Coast.

4) F Thirdly. The Government of West Florida, bounded to the Southward by the Gulph of Mexico, including all Islands to Lake Pentchartrain; to the Westward, by the said Lake, the Lake Mauripas, and the River Mississippi; to the Northward, by a Line drawn due East from that Part of the River Mississippi which lies in Thirty one Degrees North Latitude, to the River Apalachicola or Chatahouchee; and to the Eastward by the said River.

5) G Fourthly. The Government of Grenada, comprehending the Island of that Name, together with the Grenadines, and the Islands of Dominico, St. Vincents, and Tobago.

6) H And, to the End that the open and free Fishery of Our Subjects may be extended to and carried on upon the Coast of Labrador and the adjacent Islands, We have thought fit, with the Advice of Our said Privy Council, to put all that Coast, from the River St. John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, under the Care and Inspection of Our Governor of Newfoundland.

7) I We have also, with the Advice of Our Privy Council, thought fit to annex the Islands of St. John's, and Cape Breton or Isle Royale, with the lesser Islands adjacent thereto, to our Government of Nova Scotia.

8) J We have also, with the Advice of Our Privy Council aforesaid, annexed to Our Province of Georgia all the Lands lying between the Rivers Attamaha and St. Mary's.

**PART II K**
**PREAMBLE** And whereas it will greatly contribute to the speedy settling Our said new Governments, that Our loving Subjects should be informed of Our Paternal Care for the Security of the Liberties and Properties of those who are
1) L and shall become Inhabitants thereof; We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under Our Great Seal of Great Britain, by which the said Governments are constituted, given express Power and Direction to Our Governors of Our said Colonies respectively, that so soon as the State and Circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of Our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America, which are under Our
M immediate Government; and We have also given Power to the said Governors, with the Consent of Our said Councils, and the Representatives of the People, so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Publick Peace, Welfare, and Good Government of Our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies: And in the mean Time and until such Assemblies can be called as aforesaid, all Persons inhabiting in, or resorting to Our said Colonies, may confide in Our Royal Protection for the Enjoyment of the Benefit of the
N Laws of Our Realm of England; for which Purpose, We have given Power under Our Great Seal to the Governors of Our said Colonies respectively, to erect and constitute, with the Advice of Our said Councils respectively, Courts of Judicature and Publick Justice, within Our said Colonies, for the hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as
O near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to Us in Our Privy Council.

2) P We have also thought fit, with the Advice of Our Privy Council as aforesaid, to give unto the Governors and Councils of Our said Three New Colonies upon the Continent, full Power and Authority to settle and agree with the Inhabitants of Our said New Colonies, or with any other Persons who shall resort thereto, for such Lands, Tenements, and Hereditaments, as are now, or
Q hereafter shall be in Our Power to dispose of, and them to grant to any such Person or Persons, upon such Terms, and under such moderate Quit-Rents, Services, and Acknowledgments as have been appointed and settled in Our other colonies, and under such other Conditions as shall appear to Us to be necessary and expedient for the Advantage of the Grantees, and the Improvement and Settlement of our said Colonies.

**PART III R** And whereas We are desirous, upon all Occasions, to testify Our Royal Sense and
**PREAMBLE** Approbation of the Conduct and Bravery of the Officers and Soldiers of Our Armies,
1) and to reward the same, We do hereby command and impower our Governors of Our said Three New Colonies, and all other Our Governors of Our several Provinces on the continent of North America, to grant, without Fee or Reward, to such Reduced Officers as have served in North America during the late War, and to such Private Soldiers as have been or shall be disbanded in America, and are actually residing there, and shall personally apply for the same, the following Quantities of Lands, subject at the Expiration of Ten Years to the same Quit-Rents as other Lands are subject to in the Province within which they are granted, as also subject to the same Conditions of Cultivation and Improvement; viz.

2) To every Person having the Rank of a Field Officer, Five thousand Acres. — To every Captain, Three thousand Acres. — To every Subaltern or Staff Officer, Two thousand Acres. — To every Non-Commission Officer, Two hundred Acres. — To every Private Man, Fifty Acres.

We do likewise authorize and require the Governors and Commanders in Chief of all Our said Colonies upon the Continent of North America, to grant the like Quantities of Land, and upon the same Conditions, to such Reduced Officers of Our Navy, of like Rank, as served on Board Our Ships of War in North America at the Times of the Reduction of Louisbourg and Quebec in the late War, and who shall personally apply to Our respective Governors for such Grants.

**PART IV S**
**PREAMBLE** And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them,

1) **T** or any of them, as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their

**U** Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

2) **V** And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the

**W** West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.

3) **X** And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

4)a) **Y** And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or

4)b) they shall think proper to give for that Purpose: And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves or by Our Commissaries to be appointed for this Purpose, to direct

Z and appoint for the Benefit of the said Trade; And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all Our Colonies respectively, as well Those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in Case the Person, to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

5) AA And We do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who, standing charged with Treasons, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Tryal for the same.

Given at Our court at St. James's, the Seventh Day of October, One thousand seven hundred and sixty three, in the Third Year of Our Reign.

**GOD SAVE THE KING**

## SCHEDULE 4

### MEN OF MEDEEK, PART I. (pages 3-132) — Ex. 898

(by Will Robinson (Medeek), as told by Walter Wright)
[narratives listed here refer to moose and Legaic
and other historic indicators]

#12. Success and Hardship

37: "... the nephew of Neas Hiwas returned with joyous news of a land of plenty ... he told of the beaver meadows, the moose and caribou ..."

#13-#18, all related to #12, as these all appear to concern the same body of people migrating.

#19-#22 — these stories are all related, and tie into #17. In #19, the men of Medeek dream of revenge for the treatment of the body of the Bear chief by Steehow (in #17, p. 51) Neas Hiwas decides that it is time for retribution, and tells his people to prepare for battle — Klew-na will be destroyed. In #20, preparation for battle. In #21, Klew-na is attacked, and many people are killed. In #22, years of prosperity followed, but the decision to go on a great raid is made.

#22-#37 seem all to relate to the same individuals and time periods. In #23, Kitlope is successfully attacked, but a nephew of Neas Hiwas is killed. In #24, more booty is taken, girls are ransomed, and then the warriors head homeward. In #25, Neas Hiwas and the other Medeek men are insulted, but they decide not to attack. In #26, some Medeek men decide to stay and live in Kitkatla. In #27, two more men decide to stay at the mouth of Gitnidox. #28 finds the men of Medeek home at Kitselas, and making the decision to vindicate an old feud. (relates back to #14) In #29, there is preparation for a feasting month. In #30, Neas Hiwas (Medeek chief — Bear) goes to the Kitwanga Eagles chief Coor, and invites him to a feast. In #31, Coor's people come for a feast, it is a trap, and most chiefs are killed. Only one escapes. In #32, the new chief Coor comes to Neas Hiwas three years later, desiring a peace making, asks for Neas Hiwas' daughter in marriage, throws maiden in fire in retaliation for the death of his uncles. In #33, Neas Hiwas comes to visit his daughter, and ends up being murdered by Coor's men as are most, but not all of his men. "two years later" (p. 101) #34, the new Neas Hiwas instructs his people to prepare for retaliation. In #35, Neas Hiwas' people attack Coor's village. In #36, more about the attack, and then there is a peace agreement between Coor and Neas Hiwas. #37 describes a feasts of triumph.

### MEN OF MEDEEK, PART II. (pages 134-192) — Ex. 898

(by Will Robinson (Medeek), as told by Walter Wright)

**Chapter 1. The Feud (134-146)**

(How a feud started between the Kitselas Eagles and the Kis Po Lockts Eagles while they were eulachon fishing at the mouth of the Nass River and how that feud continued as the latter pressed their claims to rights to trade up-river from Kitselas. References to Legaic throughout, who was uncle to the Gispaxloats protagonist, suggest that events described in the chapter took place in protohistoric or historic times.)

134: the Tsimshian prince (who became Whiick Haalkt) was Legaic's nephew.

137: "[T]he Tsimshian chief came to pay for the body of the Kitselas chief whom he had killed" ... with buckskins.

138: "Whiick Haalkt proceed to pay for the body of Neas Haloopskt. He paid with eight men of buckskins and with one little aiatesk [?] that was equal to two men of buckskins. Each buckskin was worth $70.00 so the Tsimsean chief paid $14,000 for the body."

139: "It was the custom for the Kitselas people to trade with the people of the interior three times a year. Neas-D-Hok and those who held his power were the first canoe to go up-river, and after him came the other people of Kitselas. They traded in the spring for furs, in the summer for food, and in the fall again for furs. It was also the custom that after the Kitselas people had finished their trading to allow Legaic and the other Eagles to go up-river to trade." . . . paying for the body allowed the nephew of Legaic to continue (after a lapse of three years) going up river past Kitselas "to the up-river country of Kitetsan."

### Chapter 2. The first war between the Kitselas and the Tsimshians (pages 147-158)

This narrative starts (p. 147) with: "At the time of the feud Legaic was the head of ten chiefs who ruled over the Tsimpseans." Legaic is the chief who mounts the attack against the Kitselas. On p. 153 it is said that "many thousands of Tsimpseans opposed the Kitselas warriors." On p. 155 Legaic's men described as "the people of Dudoward, Kinatoix, Gitwilgoitks, Kitlan and Gitlakarkts". Legaic's people are defeated after a long battle, and forced to retreat to the coast. [see M. Robinson, Garfield and Rosman/Rubel re the protohistoric/historic emergence of the Tsimpshian "superchiefs"]

147-: preparation of a large fortress at Kitselas "Medegam Doktz"

150: buckskin tents

### Chapter 3. The second war against the Tsimpseans (158-166)

Two years after the first war, the elders at Kitselas decided to line up the support of "people from the other towns on the river" by holding a feast. They instructed chief Neas-D-Hok (p. 158): "Make an agreement with them that they will help us if the people of the coast make war on us again." The people invited were the people of Kitsumgallum, Kitseukla, Kitwanga, Kitwancool, Git-lac-Damix, Hagwilget and Kispiox, and, (p. 159) "[i]n this manner the people of the river became united, a federation of villages banded together to protect one another." Legaic hears of this, and decides to mount an even bigger attack than he had the previous time, this time calling the people from the south: Kitimat, Kitlop, Bella Bella, Bella Coola, Noickt Stor and Temnkt Whilk across Queen Charlotte Sound and on the west coast of Vancouver Island. Legaic's messenger explained "that Legaic asked for their help and that he had sent gifts of buckskins and other goods to pay for their assistance . . ." (p. 159-60) Legaic eventually gathered his many attackers together. "How many warriors gathered is not known but they are in the thousands. Later when they came up the river the waters of the Skeena swarmed with canoes from Kwinitza to eight miles upstream." (p. 161) Legaic's men are unable to find the people of Kitselas, they burn down the village, but then retreat. Peace lasted for some time (p. 166): "The little girl who had seen the many warriors became an old woman and still there was peace."

161: a totem pole breaks at Kitselas while the defenses are being prepared, and "The people remembered another time that a totem pole had broken and a great sickness had come to Kitselas, killing many people." [reference to an epidemic of an introduced disease?]

### Chapter 4. The Slaying of Neas Kitlop (pages 167-171)

167: a feast held with a plentiful supply of food and buckskins

169: large quantities of buckskins used for ransom

169: [EXCHANGE] "In the early days a high-ranking Kitselas woman . . . adopted a boy of Legaic's people."

171: the ranking Kitselas chief was killed by Legaic during an attack, but the Kitselas people were not strong enough to retaliate, and the peace continued.

### Chapter 5. The war against the Haidas (172-183)

Leaving the Nass after a season of eulachon fishing, Legaic was attacked by some Haida people, "led by Chief Weijhuhuns and his nephew Nass Stowe." (p. 172) The women and children were captured for slaves, but the men escaped back to the Nass River, where they warned the Kitselas people of the attack. "The following winter Legaic sent messengers to Neas-D-Hok (of Kitselas) ordering him to give assistance in a war against the Haidas in September when the fishing season had ended." (page 172) "When September came Neas-D-Hok gathered a fleet of twenty canoes and four hundred men from his side of the canyon. He gathered twenty canoes from the other side of the canyon and another twenty from Legaic's up-river people." Legaic and his allies take their canoes across to the Charlottes. "[T]he upper-river men used arrows of saskatoon wood, tipped with bone and barbed with two or three barbs so they could not be withdrawn. But when the Haidas heard that shankes were sued as arrows they were terrified, all eighteen tribes, from one end of the islands to the other." (p. 176) [Legaic chased the Haida back in the last war, 1831] On page 179, the senior Haida chief "sent word to the people of the islands of lower Alaska and called on them to come and help him fight against the invaders. He summoned, in all, the people of eighteen towns."

179 — armour of highly decorated, light buckskin.

181 — the Tsimshian capture many of the young Haida men "to be used as slaves," and also take the old, important chief prisoner.

183 — Legaic demands an aiatesk in payment, but the Haida chief dies.

### Chapter 6. The final conflict (pages 184-192)

184: "A new generation of people had grown up since the war with the Haidas . . . Then came the day when guns came into the land, old flintlocks from the east . . . One year a trading schooler came to Kitimat from the new colony that is now Victoria" . . . whisky and barrels of gunpowder. the chief Kit Houn purchases and hides barrels of gunpowder, then urges his people to get guns and gunpowder from wherever they can — mention of Hagwilget and Babine. This chief's successor dies of an ailment similar to smallpox which carried off many of the Kitselas people. (1862/63 epidemic?)

185: the chief Kit Houn after this one was the informant's father's brother

185-6: "In those days it was still the custom for my father's house to trade with the people of Hagwilget and the upper river. After my father's house had returned the people of Legaic would ask permission to go up-river so that they too might trade. If their request was viewed with favour they were allowed to pass, but if there was reason to refuse they had to return to the coast."

188: RE MARRIAGE AS A BASIS FOR ESTABLISHING A TRADING PARTNERSHIP. When the Tsimpseans returned to their town Legaic called a great council. He was eager to fight against the Kitselas and the council agreed to waging a war the following year. Now many of the Kitselas men were married to women of the Tsimpseans.

## TEMLARH'AM: THE LAND OF PLENTY ON THE NORTH PACIFIC COAST

by Marius Barbeau

[narratives listed here contain descriptions of historic indicators such as copper, guns, Legaic, Haimas, and so on.]

| | |
|---|---|
| Ex. 1047-14 | #14. The Ska'waw myth (366-67)<br>p. 367 a two story house (see also #15) |
| Ex. 1047-15 | #15. The young daughter Ska'waw (368-374)<br>p. 373 shears, large house |
| Ex. 1047-20 | #20. A history of the Gitlaen tribe (393-396)<br>p. 394 "The woman and her husband had a daughter . . . very fair, with light hair." |
| Ex. 1047-21 | #21. The origin of the Gitlaen (399-412)<br>[a similar narrative to #13, Beynon's comment about a gesture is that it could be a Catholic symbol — check] |
| Ex. 1047-51 | #51. A feast sponsored by Harhpegwawtk (546-553)<br>Beynon in 1954: "some fifteeen years ago, I . . . was invited to accompany a party of Gitrhahla people to a feast . . ." |
| Ex. 1047-61 | #61. The ginarhangik raid the Dedaw (Nootka) (595-597)<br>p. 596 "It was just at the time when guns first came into use." recorded in 1939. |

| | |
|---|---|
| Ex. 1047-62 | #62. the Tsimsyan way of fighting (598-600)<br>p. 598 Hai'mas |
| Ex. 1047-63 | #63. The ginarhangik at war on the Sitka (601-605)<br>p. 601 Hai'mas, moose hides<br>p. 603 "This was at the time when guns were first introduced in the country."<br>p. 604 confederacy for war . . .<br>p. 605 guns<br>p. 605 Tsimshian mercenaries |
| Ex. 1047-65 | #65. Gyaemk's trading experiences (609-612)<br>p. 609 Informant (aged 73 in 1952) said: "Gyaemk told me this narrative |
| Ex. 1047-66 | #66. The Tsimsyan attack the Qutaerh (Aleutians) (613-615)<br>p. 613 informant (aged 72 in 1952) "said that his grandfather had seen the following events." mention of HBC/Nass post/Kennedy |
| Ex. 1047-67 | #67. The Qutaerh chased away (616-617)<br>p. 616 "The Hudson's Bay Company had just left the Nass River . . ." |
| Ex. 1053-24 | #68. A standing up or cleansing feast (618)<br>event occurred in 1914, recorded by Beynon |
| Ex. 1053-25 | #69. "Weesaiks now invites you" (619-620)<br>Beynon witnessed this, and recorded it in 1947-48 |
| Ex. 1053-26 | #70. The purchase of the Nahuhulk (621-647)<br>story about acquisition of copper shield, the Hahulk copper (p. 641)<br>p. 625. moose hides and caribou hides |
| Ex. 1053-27 | #71. The origin of the Ginarhangik copper shield (648-656)<br>p. 651 much of this like #69<br>"three scores of copper shields" |
| Ex. 1053-28 | #72. The great copper shield of the Ginarhangik (657-660) |
| Ex. 1053-29 | #73. How the Ginarhangik copper shield was acquired (661-662) |
| Ex. 1053-30 | #74. The copper shield of the Ginarhangik (663-665)<br>p. 663 moose hides, and valuable furs used for cloaks |
| Ex. 1053-31 | #75. The Ginarhangik go down in rank (666-669)<br>copper shields |
| Ex. 1047-77 | #77. The female head-chief of the Giludzqeu tribe (674-676)<br>p. 674 [Victoria Young] "had received the ties of the new mission church established by Wm. Duncan |
| Ex. 1047-78 | #78. The controversy between 'Neeshlkumik and Rapligidaehl (677-682)<br>p. 677 more about Victoria Young |
| Ex. 1047-79 | #79. The resentment of the Giludzaeu chief against the Git'andaw<br>more about Victoria Young |
| Ex. 1047-80 | #80. The murder of two chiefs (685-686)<br>trading trip to Victoria |
| Ex. 1047-94 | #94. The murder of Maws (749-756)<br>p. 749 gun |
| Ex. 1047-95 | #95. The tradition of Kwiyaihl, of Kispayaks (757-771)<br>p. 760 smallpox, cholera |
| Ex. 1047-110 | #110. Weeyawn of Gitrhadeen, on the Nass (802-<br>another location for Temlarh'am<br>p. 803 copper shield |

RAVEN-CLAN OUTLAWS ON THE NORTH PACIFIC COAST, by Marius Barbeau [narratives selected for their historic features or other unusual elements — such cedar bark sails . . . also references to people such as Hai'mas, Legaic, Weesaiks . . . some passages concerning territories]

**SECOND PART: TRUE NARRATIVES (ADAORH)**

| | |
|---|---|
| Ex. 1051-9 | #6. Hai'mas and his Wudzen-aleq band (84-88)<br>[Charles Barton, Kincolith/Interp. Charles Barton, 1927]<br>reference to red hair, p. 84. "These boys were red-headed (reddish hair). So the old Alimlarhae gave an order to bring all the other boys in other tribes, whose hair was like the Hai'mas boys, that is only Kanhada (Raven-Frog) children." [SR -does the red hair indicate contact with people other than Indians?]<br>p. 84 name for child "bark case of a copper"<br>p. 88 "Note: The informant learned this narrative from one of the leading Wudzen'aleq named Qaugyaehl, who was a much older man and who died at Kincolith. He never left the Nass, and was one of their leaders. He (Barton) also heard this story from Alimlarhae of the Ginarhangik many times. [P] The career of Hai'mas cannot have happened very long ago, although I (Barton) have not seen these very warriors, who were in the fight. But the people who told me about him had seen him. It is not a very old story. Hai'mas and his ‘aleque remained in power for many years before they got broken up. It was a reckless act of him to try and kill those Tsimsyan chiefs. It was what broke him up in the end. Without it, they would not all have ganged up together against him. He could have stood up against any one tribe. But that time there were too many tribes." |
| Ex. 1051-11 | #8. Hai'mas and his Kanhada Warriors (95-104)<br>[Mr. and Mrs. Peter Ryan, both 70, Metlakatla/Interpre. Beynon, 1952]<br>reference to a woman being very fair, with reddish hair, p. 96<br>— one of Hai'mas' Ganhade sisters (mink anus/flatulence/she is burnt on a pyre)<br>— the man closest to Hai'mas, Mawkskembaen (Gitsees) |
| Ex. 1048-17 | #17. The razing of Ksemateen (135-136)<br>[Herbert Wallace, Gitsees/Interp. Beynon 1926]<br>Hai'mas |
| Ex. 1048-18 | #18. Retaliation of the Tlingit (137-139)<br>[Herbert Wallace, Gitsees/Interp. Beynon, 1926]<br>Hai'mas |
| Ex. 1048-22 | #22. ‘Ayairansk, the great Kanhada warrior (157-159)<br>two nephews of Legaic, moose skins |
| Ex. 1048-23 | #23. ‘Ayairansk of Gitrhahla outwitted (160-161)<br>parallel to #22 |
| Ex. 1048-24 | #24. The pearled bow of ‘Ayairansk, mouldy ear (163-165)<br>coppers |
| Ex. 1048-25 | #25. Origin of the name of Sabaen (167-169)<br>[George McCauley, gitrhahla/Interp. Beynon, 1916]<br>ship with sails, "soap", biscuits, molasses, rice, etc. |
| Ex. 1048-26 | #26. Gidaranits and Tsimsyan raids (170-3)<br>p. 172, Hai'mas |
| Ex. 1048-27 | #27. Tlingit and Tsimsyan warfare (174-7)<br>one of the myths cited above refers to this style of warfare |
| Ex. 1053-17 | #29. A Tlingit Humiliation Pole (180-183)<br>[James Peel, Kaigani, age 71/Recorder Beyon, 1952] |

| | |
|---|---|
| | p. 183 "The informant . . . was told this story by his grandfather, who had witnessed the incident." "There had been several raids on the Haida by the Tlingit people from Tongas . . ." the narrative is about a Haida woman who became pregnant while she was a captive of the Tlingit . . . how she was redeemed but how it took some time to redeem her son. |
| Ex. 1048-34 | #34. The Tsimsyan at Metlakatla (196-198)<br>informant William Beynon. notes about the history of Metlakatla written in 1952 |
| Ex. 1048-36 | #36. The Gitwilksebae tribe of the Tsimsyan (204-7)<br>p. 205 copper shield |
| Ex. 1048-37 | #37. A Gitsalas war upon the Haida (208-210)<br>[Charles Abbott (Port Simpson)/Beynon 1927]<br>p. 210 "sails in the distance" No prehistoric use of sails on the coast [see Narrative 46, below]<br>p. 209 moose skins<br>p. 210 Hai'mas |
| Ex. 1048-38 | #38. Gitrhahla feud with the Haida (211-213)<br>p. 213 one native successfully usurps the "traditional" fishing rights of another by using the Government Registration system.<br>p. 212 a sail of cedar mat |
| Ex. 1048-41 | #41. Haida invasion of Knemaes (219-20)<br>page 220, groups mentioned shooting at each other |
| Ex. 1048-42 | #42. Niskae and Haida Wars (221-224)<br>— part I, "in those days there were no guns: part IV, p. 223, "guns had arrived then." |
| Ex. 1048-44 | #44. Captivity of Haida Princesses among the Niskae (227-231)<br>[Robert Stewart (Niskae)/ Beynon, 1952<br>p. 227 "There was a time when the Haida made very frequent raids upon the Niskai and even came up to the canyon, Gitwenksihlk. This was when the Hudson's Bay Co., had its trading post at the mouth of the Nass River."<br>maiming the Haida men<br>p. 230 Haida compensation gifts paid to the Niskae<br>(p. 230) "canoes, furs, foods, slaves, and copper shields." |
| Ex. 1048-45 | #45. The last Haida Invasion on the Niskae (232a-237)<br>[Robert Stewart (Niskae)/ Beynon, 1948-9<br>p. 232a. "This happened at the time when the white traders arrived on the coast . . . The informant [age 70] heard this from an uncle who was a young child at the time." |
| Ex. 1048-46 | #46. Lutrhaisu and Naeqt, her son (239-248)<br>[Salomon Johnson, Kispayaks/ Interp. Constance Cox, 1920]<br>p. 243 ". . .the canoe will be under sail" |
| Ex. 1048-47 | #47. The epic of Naeqt (249-254)<br>a man was starved so he sold his name<br>p. 249 moose skins at Qaldo<br>p. 251 Kitwanga attacked by Kitimat<br>p. 253 paid mercenaries |
| Ex. 1048-48 | #48. Naeqt the warrior (255-7)<br>p. 256 copper shield<br>p. 257 loss of territory in compensation payment |
| Ex. 1048-50 | #50. The tradition of the household of Naerhl (265-274)<br>[Isaac Taens, Gitenmaks/ Beynon 1920]<br>p. 274. "shot him, [with a gun, one of the first used in the country]." |

| | |
|---|---|
| Ex. 1048-51 | #51. The Eagle Crest on a Kanhada Pole (275-6)<br>[Beynon, 1952]<br>Naequt leading a raiding group from the Gitksan against the Kitimat chief Senarhaet, gets two-eagle crest as trophy.<br>p. 275 "There was a great controversy between the Kanhada (Raven-Frog) house of Wistis of Gitsegyukla and the Hlengwarh of Gitwengaeh [both Gitksan tribes] as to whether Wistis had the right to erect a pole which Hlengwarh claimed was his. The question was submitted to the Indian Agent [at Hazelton] . . ." |
| Ex. 1048-52 | #52. The origin of Weehlaingwerh, Earthquake (277-94)<br>p. 279 Hai'mas — one of the main players in the "after the floods redistribution of population<br>p. 280 mother of Naeqt, Naeqt's house has moose hoofs<br>long passages on territory |
| Ex. 1048-51 | #53. Person-of-the-lake (295-8)<br>this one is historic if first line is taken literally |
| Ex. 1048-54 | #54. Origin of Gitwinhlkul (299-305)<br>"Native Brotherhood" |
| Ex. 1048-55 | #55. The origins of the Gitwinlkul tribe (306-310)<br>p. 306 many copper shields (otherwise, very similar to #54)<br>p. 309, smallpox |
| Ex. 1048-56 | #56. Origin of family of Lurhawn (312-316)<br>[George Derrick, Gitwinlkul/ 1954]<br>"(313) In the pack which these brothers brought from the Nass, they had leafed a tobacco (mi'yaen: to smoke)." Smoking is part of a relatively recent tobacco use complex, and more common to the southern part of interior B.C. Smoking tobacco in this context, therefore, suggests that it is of European derivation.]<br>pp. 312, 314, 315 guns and firearms |
| Ex. 1048-57 | #57. Origins of Lurhawn in the Groundhog country (317-337)<br>p. 330 miniature coppershields<br>p. 335 moose hide moccasins |
| Ex. 1048-62 | #62. 'Ahlawals family at Angyedae (349-50)<br>[Charles Barton, Kincolith/ 1927]<br>p. 349 "guns of medium size" |
| Ex. 1048-64 | #64. The ta'awdzep of the Gidzarhlaethl (354-7)<br>p. 354-5, sails of cedar mat |
| Ex. 1048-66 | #66. Hunting territories of the Git'andaw (360-5)<br>p. 364-5, moose skins |
| Ex. 1053-18 | #67. The bad waters of Cape Mudge (366-7)<br>[Heber Clifton/ recorded Beynon, 1952]<br>p. 367 reference to a whisky feast, gun |
| Ex. 1048-68 | #68. the Ginarhangik go down in rank (368-73)<br>large copper shield, moose skins, Haimas |
| Ex. 1048-70 | #70. Origin of Neesksehnaet (376-82)<br>p. 378 Legaic and nephew<br>several crest origins described |
| Ex. 1048-71 | #71. War between the Gisparhlaw'ts and the Gitsees (383-93)<br>p. 389 Hai'mas<br>p. 391 copper shields |

| | |
|---|---|
| Ex. 1048-72 | #72. The Niskae invasion of Gitsalase Territories (395-400)<br>[John Tate, Gisparlaw'ts/ Beynon, 1948]<br>p. 396 "When the white traders came, the demand for furs was very keen." |
| Ex. 1048-73 | #73. The story of Gitsemraelen (402-5)<br>p. 403, reference to a humanoid carving about 40 years old |
| Ex. 1048-75 | #75. The last raid of the Niskae against Kispayaks (409-411)<br>[Jimmy Williams, Kispayaks/ Interp. Beynon, 1920]<br>p. 410 ammunition, "heard the shots" |
| Ex. 1048-76 | #76. The Larhsai'l of Kwanradalh (413-9)<br>p. 413 plague<br>p. 415 copper |
| Ex. 1048-79 | #79. Secret Societies among the Gitksan (428-431)<br>Arthur Mowatt, Kispayaks and two others, also about 70/ recorded by Beynon, 1953.<br>"Moricetown people who were the Hagwelget" |
| Ex. 1048-80 | #80. The Niskae and the Tsetsaut (432-3)<br>EXHIBIT 902-9/collected by James Teit for the National Museum, ca. 1915<br>p. 432 Over one hundred years ago, it is not known how long ago, one of the Tsetsaut killed a Niskae near Miziadin Lake." |
| Ex. 1048-81 | #81. Peace between Qaldo and the Niskae (435-9)<br>[John Brown, Kispayaks and Cox/ Interp. Constance Cox, 1920]<br>guns and white ladies' stockings |
| Ex. 1048-83 | #83. Tsetsaut raid on Maluleq (443-9)<br>Ex. 1055-1 [John Brown, Kispayaks/ Interp. Beynon, 1920] p. 443 "[In the lifetime of his grandmother, John Brown heard her tell the following story of another Tsetsaut raid of which she had been witness when young.]" references to white people |
| Ex. 1048-84 | #84. Indian Frontiers at Kisgagas and Babine (450)<br>[Arthur Hankin, Hazelton/ 1923]<br>after the Hudson's Bay Company had arrived |
| Ex. 1053-19 | #87. The Murder of a Khlawak by Pahl (454-5)<br>[Elliott (Nass River)/ narrative recorded by Beynon]<br>money, police, sails, round-bottomed boat, steamer |
| Ex. 1048-88 | #88. The Massacre of white traders by Kamtsoop (456-8)<br>[John Tate, Gisparhlaw'ts/ Beynon, 1948]<br>p. 456 trading ship, sea otters |
| Ex. 1048-89 | #89. when metals were first introduced among the Tsimsyan (459-62)<br>a Tlingit canoe maker uses copper tools — "this is the first time that metal was found in use for the making of canoes and other things. |
| Ex. 1048-90 | #90. Early traders with the Tsimsyan (464-6)<br>[Beynon, present and narrating at a feast in 1949]<br>Japanese. |

THE GWENHOOT OF ALASKA: IN SEARCH OF A BOUNTEOUS LAND, by Marius Barbeau (1959) — references which can be associated with dates.

**PART II. THE ADAORH OR TRUE TRADITION OF THE TSIMSYAN**

These are Barbeau's summaries (with some interpretation) of narratives he was told. where the adaorh in Part II are correlated with narratives in Part III, this is indicated in square brackets, as in "[cf. III 29]". almost all of the narratives in Part II can probably be linked to an historical context, that is, if it is assumed that references to copper and"Legaic" are historic and protohistoric.

Ex. 1054 #8. The Gwenhoot on the march southwards (67-73)
p. 73 "They also saved their large copper shields . . ."

Ex. 1054-9 #9. Strife between the Eagles and the Wolves (74-76)
p. 75 copper shields
p. 75 double-bladed dagger

Ex. 1054-12 #12. Six Canoes once landed at Klawaq (p. 84-91)
p. 85 copper shield
This tale contains many elements which Barbeau considered to be recent. It describes a young man who is trapped and drowned by a giant clam, after being attacked by a giant devilfish. It also refers to a giant man-eating halibut. There is (p. 86) a young man who wears a stuffed eagle's head as a crest. Barbeau, p. 90-91: "The Thunderbird or Eagle clan system among the Tlingit, the Tsimsyan, and the Haida, is of recent adoption — the latest of all social developments. Among the Kwakiutl, of Alert Bay on the Northwest coast, it is less than a hundred years old and goes back to the fur-trading activities of the Russians and the British." re: the devilfish and the giant clam, Barbeau writes: "How the Na'a in the neighborhood of Cape Fox and Portland Canal . . . could have secured actual knowledge of these two monsters of the tropical seas is a question that cannot be definitely answered because of two alternatives." one is information may have come from Kanaka's (Sandwich Islanders), brought to the coast by white traders — or some of the Indians from southern Alaska may have been taken south aboard maritime fur trade/sea-otter hunting European vessels.
[see also: #19, #23]
cf. Alaska Beckons, 84-90

Ex. 1054-17 #17. The Tahltan "slaves" of the Sarau'wan (pp. 111-3)
p. 113 "This all happened about the time the white people made their appearance." [= kin may have disappeared when passing under the glacier — they (wolves) passed under the glacier. — Tsetsaut from Laxwiiyip were slaves — the masters traded with whites]
cf. III 38

Ex. 1054-18 #18. On their way past the glacier to Leesems (pp. 114-6)
p. 115: "[the Russian Imperial Emblem]" Barbeau's interpretation of a crest described in the tale.
p. 115 reference to copper shield
p. 119 copper shields
[Stikine glacier — huge monster on the shore]
cf. III 39,40,41

Ex. 1054-19 #19. The Flight of the Gwenhoot from Na'a southwards (pp. 117-120)
p. 117 copper shields, supernatural halibut
p. 119 copper shields caught by huge shellfish — name "Anchor of Copper"
[see also #12, #23]

Ex. 1054-22 #22. The Gwenhoot Eagles of the House of Neeswa'mak (127-131)
p. 130 large coppers
cf. III 47,48, see also III 63

Ex. 1054-23 #23. Migrating south from Lahrsail (pp. 132-4)
p. 133 "It is here that they lost their Prince to a sea monster, Devil-Fish and the Rock-Oyster Kahl'awn, which caught him while he was swimming."
[see #12, #19]
cf. III 51,52

Ex. 1054-24 #24. How the Gitsemraelem Eagles Originated (135-138)
p. 135 copper shields
p. 137 copper shields
cf. III 55,63

| | |
|---|---|
| Ex. 1054-29 | #29. How Legyaerh originated at Bella-Bella to the south (151-154)<br>p. 151 copper shields<br>p. 151 Legaic |
| Ex. 1054-30 | #30. The Origin of Neeswa'mak and Legyaerh (155-157)<br>p. 155 Legaic<br>cf. III 63 |
| Ex. 1054-31 | #31. The Bella-Bella origin of Legyaerh (158-161)<br>p. 158 Legaic (throughout)<br>p. 160 copper shields<br>cf. III 65 |
| Ex. 1054-32 | #32. The Rock Painting of Legyaerh on the Nass (162-165)<br>p. 162 Legaic (throughout)<br>p. 163,164,165 copper shields<br>p. 165 moose skins<br>cf. III 67 |
| Ex. 1053-8 | #34. Raids of Legyaerh upon the Wudstae (pp. 169-74)<br>p. 169: "The following raid happened [a little over one hundred years ago] . . ." at the time the first white men came to Tsimsyan — copper shields |
| Ex. 1053-9 | #38. The Gisparhlaw'ts at war with the Masset Haida (pp. 189-92)<br>p. 192: copper shields<br>cf. III 80 |
| Ex 1053-10 | #40. Tsimsyan Raid upon the Gitraitz Haida (pp. 196-7)<br>p. 196: "sailing ships", trade with "white seamen", "cloth", etc.<br>gun, pre-post at Port Simpson — guns<br>cf. III 83 |
| Ex 1053-11 | #41. A fight between the Haida and the Tsimsyan, at Port Simpson (198-201)<br>pp. 198-201: "The Haida used to come in large dugouts to Port Simpson [after 1833] for trading." "The missionary and officials of the Hudson's Bay Company intervened and stopped the fight."<br>muskets, guns<br>cf. III 84, 85a, 80 (latter part) |
| Ex 1053-12 | #42. Legyaerh tried to conquer the Nass (pp. 202-3)<br>p. 202: "at the time when the Kincolith Mission was established"<br>copper shields<br>cf. III 86 |
| Ex. 1054-43 | #43. A trading incident between the Niskae and the Gisparhlaw'ts (pp. 204-208)<br>p. gun<br>p. 208 (on last page, in reference to another version of the story): "The upper Skeena was a very rich district for the native trade, as this country was bountiful with fruits, furs, and moose hides used for coats and winter rainments. The white traders had now arrived on the coast and were trading with the Tsimsyan."<br>cf. 87, 89b |
| Ex. 1054-44 | #44. Legyaerh's trading privileges on the upper Skeena (p. 209-219)<br>p. 209: "The Gisparhlaw'ts had trading privileges with the upper Skeena River tribes. These were further expanded through the close association between Legyaerh, the Eagle head-chief, with the Hudson's Bay Company, who established their post (1833) on his camping grounds at what became known as Fort Simpson and, later, Port Simpson. The Gisparhlaw'ts travelled up the Skeena in their large Haida canoes carrying as much as ten tons of freight and a crew of ten to twelve men. Legyaerh thus gained great powers [as a middle man between the traders and the inland natives], and was able to establish a monopoly in favour of himself and his tribe." |

p. 209 umbrella
[cf. Narratives III 88, 88a, 88b, 89a, 90, 91, 93, 95, 97, 98a,
[notes of interest: p. 214, moose hides used "as currency in the feasts", and "[In a briefer narrative, we learn that (No. 90)] Legaerh regarded the Skeena his own property and that of his tribe, the Gisparhlaw'ts. The other tribes, but not his own, enjoyed the possession of hunting and wild-berry territories, also fishing stations. ["This was due to the late arrival of Legyaerh into this tribe which was 'parvenue', so to speak."] p. 210 The Kitselas had learned a new defence from Naeqt's experience when raiding the Git'amat — tie logs, then release.
p. 211 gold rush increased demand for Legaic

Ex. 1053-13 #47. The Last Big Iyaok of Legyaerh (p. 224-7)
p. 225: Barbeau's footnote describes this particular feast of Legyaerh as having "happened after the establishment of the Hudson's Bay Companies' post at Port Simpson.
p. 225 moose skins
p. 226 moose skins, copper shields
cf. Narratives III 100, 101

Ex. 1053-14 #48. Controversy over the Shark-fin and Gnawing-beaver crests (p. 228-229)
p. 228 "This happened at Port Simpson, after the Hudson's Bay Company had built its fort."
copper shield
p. 228 copper shield
[Gisparhlaw-ts v. Hawelgyets — Tom Hankins store — see #50]
cf. III 102

Ex. 1054-50 #50. The Gisparhlaw-ts fight the Hagwelgyet (pp. 232-233)
p. 232: "Long after firearms had made their appearance in this country . . ." Tom Hankins' store
at Gitenmaks, powder, shot, a barrel of whisky
cf. III 105

Ex. 1054-51 #51. The Establishment of Fort Simpson (234-6)
p. 234 HBC fort, Dr. Kennedy married Legaic's granddaughter [In III 107, Kennedy marries Legaic's daughter. "Until then all trading took place on board of ships at anchor in the area between the Nass and the Skeena Rivers." (p. 234)
p. 235 ships, Russians, Aleuts, negro, canon
cf. III 106, 107

Ex. 1053-12 #52. A Cargo of Liquor from Victoria (237-8)
p. 237 liquor
cf. III 108

Ex. 1054-53 #53. Legyaerh's conflict with Mr. Duncan (pp. 239-40)
p. 239
cf. III 109

Ex. 1054-54 #54. The Burial of the Last Legyaerh (pp. 241-2)
p. 241: "the last Legyaerh died in 1934 . . ."
p. 241 Legyaerh had a daughter whose name was Sarah
cf. 110-111

Ex. 1054-55 #55. The End of a Long Trail (pp. 243-246)
p. 243 (this narrative deals with several time periods, including historic) competing Tsimshian-Niskae claims to territories

## PART III. TRADITIONAL NARRATIVES (ADAORH)

(narratives 1-28, see references above — c.f.)

Ex. 1046-33 Narrative 33.
Gitrhawn's trading privileges on the upper Skeena (275-283)
p. 278 Legaic (and throughout)
p. 279 moose skins — "Many years later, now that a new Legyaerh was chief of the Gisparhlaw'ts, he wanted to overcome the Gitsalas, and to again have the privilege of trading with the upper Skeena tribes and also the Hagwelgyet tribe. It was from these people that the most important skins or hides of moose and caribou were obtained. These were valuable gifts for distribution among the chiefs during the ylaeoks, and were very much in demand among the coast tribes."

Ex. 1046-36 Narrative 36.
Sarau'wan, chief Mountain (296-299)
p. 298 when the body of the man who had been swallowed by the giant halibut was found, he had a copper ring around his neck.

Ex. 1046-37 Narrative 37.
Tsetsaut tribe, at the head of Portland Canal (300-301)
p. 301 a chief called Sarau'waeen made the Tsetsaut his vassals, "just at about the time the [white] traders began to arrive at the Nass."

Ex. 1046-38 Narrative 38.
How the Tsetsaut Band came to the Niskae (302-306)
p. 305-6 "One day, Sarau'wan, chief of the Larhskeek among the lower Niskae village at Gitiks, was looking for a new hunting territory, as the territories on the Nass (Leesems) River were crowded, and he wanted more hunting grounds. They . . . came upon the Larhkibu village of Sa'niq . . . Here they met with the Larhkibu chief, and, seeing his great supply of fur and dried fish and meats. They thought that it would be profitable to trade with them who had no canoes and were living out of the way and unbeknown to other people. The white seamen were now arriving at the mouth of the Nass River to trade with the Niskae and Sarau'wan quickly realized the advantage of keeping these people here as a source of supply. He would retrade their products to the white traders, and so for/many years he did this. Thus it became generally said, these Tsetsaut people, who were actually Larhkibu from Larh'wyip, the headwaters of the Stikine River from the Tahltan, became known as the Tsetsaut slaves of Sarau'wan."

Ex. 1046-39 Narrative 39.
The great Glacier of the Stikine (307-309)
origin of the name for a copper shield "Down-lay-the-Copper-Shield"

Ex. 1046-41 Narrative 41.
Person of the tree, a Larhskeek (311-313)
p. 313 moose skins

Ex. 1046-42 Narrative 42.
The flight of the Gwenhoot from Na'a southwards (314-319)
p. 317 copper anchor, copper shields, copper anchor trapped by a huge shellfish

Ex. 1046-47 Narrative 47.
The Gunhoot Larhskeek (332-335)
p. 332 ". . . they used coppers for an anchor."

Ex. 1046-48 Narrative 48.
The conflict at Larhsail, Alaska (336-338)
p. 337 coppers

| | |
|---|---|
| Ex. 1046-49 | Narrative 49.<br>Why the Thunderbirds and the Wolves fought at Larhsai'l, Alaska (339-341)<br>p. 341 "they used large coppers to anchor the canoes . . ." |
| Ex. 1046-50 | Narrative 50.<br>The Thunderbird clansmen fleeing southwards (342-344)<br>p. 342 a man's hand is caught in a large shellfish |
| Ex. 1046-53 | Narrative 53.<br>The Gidaranits Discovery of Ktsem'ateen (348-351)<br>p. 348 The Prince is caught by a giant clam<br>p. 350 copper tools<br>p. 351 moose skin |
| Ex. 1046-54 | Narrative 54.<br>The fight at Na'a (Alaska) (352-354)<br>p. 352 using a copper as an anchor<br>p. 352 Prince is caught by a giant clam<br>p. 352 reference to Legyaerh<br>p. 354 the Gwenhoot fugitives lose their copper anchor<br>see page 134 in II No. 23 |
| Ex. 1046-55 | Narrative 55.<br>The flight of the Gwenhoot from the North (355-9)<br>pp. 356, 358, 359 copper shield |
| Ex. 1046-56b | Narrative 56b.<br>The Stone Eagle crest of Gitsemraelem (362)<br>mention of this crest being transferred to Legaic |
| Ex. 1046-56c | Narrative 56c.<br>The Stone Eagle of Legyaerh (363) |
| Ex. 1046-62 | Narrative 62.<br>Lagyaerh of the Gisparhla'ts tribe (385-6)<br>p. 385 "The moment Neeswa'mak died, Legyaerh put coppers (hayaets) on the body of the dead chief and distributed furs and other goods to all the clans, except the Eagle clansmen, of the Tsimsyan tribes. So that nobody could dispute Legyaerh's title as chief of the Gisparhlawts." |
| Ex. 1046-63 | Narrative 63.<br>The origin of Legyaerh and Neeswa'mak (387-392)<br>Legaic origin throughout (several versions)<br>p. 392 large copper |
| Ex. 1046-65 | Narrative 65.<br>The Bella-Bella origin of Legyaerh (397-405)<br>p. 403 Legaic had "a face which was to symbolize Legyaerh and twelve copper shields, each of which had a name and were very valuable" painted on a rock. "There were many countries where these came from, and Legyaerh had traded many slaves and many moose hides for these shields."<br>note opening lines of #67, and the following from #65, p. 501, suggest the recency of this action: "(401) The rock painting was still visible there is 1914, when it was indicated to him (Beynon) as being Welgyilks-galtemhlk, Face-of Picture. The paintings as Beynon remembers it was about 6 feet high, and the coppers, about 3 feet and 2 feet in width. 'When I first saw it, it was very plain. But it has now completely washed away." |
| Ex. 1046-66 | Narrative 66.<br>The royal Gwenhoot among the Git'andaw (406) |

| | |
|---|---|
| | Legaic assumes head-chieftainship of the Git'ansdaw, as well as remaining head-chief of the Gisparhlaw'ts |
| Ex. 1046-72 | Narrative 72.<br>The last invasion of the Wudstae upon the Tsimsyan (429-437)<br>Legaic throughout |
| Ex. 1046-76 | Narrative 76.<br>Legyaerh's attack on the Haida and their reprisal (459-466)<br>p. 461 Legaic taken captive. |
| Ex. 1046-81 | Narrative 81.<br>Haida invasion of the Tsimsyan (498-502)<br>p. 498 Legaic throughout |
| Ex. 1046-82 | Narrative 82.<br>The households of Lutkudzemti, a Thunderbird (503-508)<br>traditions of the house — historic references. eg. p. 505 re: the myth of the Wooden-Eagle: "When the Stone Eagle was cast as an anchor into the sea and was lost, the royal chiefs Trahlarhaet and Nees'wamak wanted the Wooden-Eagle from Lutkudzemti, but could not get it, even for their offer to pay with slaves, canoes, and coppers. Lutkudzemti would not sell it. Guhlrairh, chief of the Git'andaw tribe of the Tsimsyan also wanted to buy it, just before the white people arrived in this country, but without success." |
| Ex. 1046-85b | Narrative 85b.<br>Clah's reminiscences on Legyaerh (pp. 519-521)<br>p. 519 "One day — date about 1840 — I went, a naked little fellow, into the chief's house . . ." (three brief versions of three separate events, each dated)<br>p. 519 Legaic's nephew shot in the eye with a bullet, which comes out the back of his head.<br>Kennedy, Legaic<br>p. 521 young Legaic |
| Ex. 1046-87 | Narrative 87.<br>A trading incident between the Niskae and the Gisparhlaw'ts (526-537)<br>p. 526 moose hides, reference to Legyaerh,<br>p. 531 cooking boxes with iron bottoms<br>pp. 532, 533, guns<br>p. 533 bright red shirt |
| Ex. 1046-88a | Narrative 88a.<br>Trading Ventures of Legyaerh (pp. 538-46)<br>p. 538 "Legyaerh, through his daughter's marriage [to Dr. Kennedy], had a great deal of influence with the Hudson's Bay Co."<br>[new defence, fortress, logs] |
| Ex. 1046-88b | Narrative 88b.<br>The war club representing a women (547-548)<br>Legaic throughout |
| Ex. 1046-89a | Narrative 89a.<br>Legyaerh's trading privileges (549)<br>moose skins and hides, trade with the upriver people three times a year |
| Ex. 1046-89b | Narrative 89b.<br>Legyaerh's last raid on the Upper Skeena (pp. 550-3)<br>p. 550, re Legaic's privileged trade with upriver people. "The Upper Skeena was a very rich district for the trade, as you traded with the Git'wenraerh, the Git-segyukla, the Gitwinhlkul, the Git'enmaks, the Kispayaks, and the Hagwilgyet tribes. This country was bountiful in furs and with fruits, and above all, moose |

hides (Wiyawn) used for coats and winter rainments. The white traders had now arrived on the coast and were frequently coming to trade with the Tsimsyan and the Niskae."
umbrellas

Ex. 1046-90 Narrative 90.
Legyaerh's trading claims (554)

Ex. 1046-92 Narrative 92.
The last fight of Legyaerh and the Kispayaks (pp. 557-9)
p. 557 moose hides (hliyawn)
p. 558 "Now Legyaerh had a new narhnok which he exhibited and called Wildedagiltk-el-larhae: "Where-folds-(plural)-the-Sky." It was an umbrella which was made of very bright colours. He had acquired it from a coast trader."

Ex. 1046-93 Narrative 93.
Legyaerh's attack on the Kispayaks tribe (560-562)
p. 560 umbrella, daaq house.
Informant chief Semedeek, Beyon interpreter in 1924. Informant stated (p. 562): "I heard this narrative from that woman herself, when she gave it out among the women of the household. I was small, just able to remember, a small boy."

Ex. 1046-94 Narrative 94.
Legyaerh at Kispayaks with his umbrella (pp. 563-4)
p. 563 Legyaerh and his umbrella

Ex. 1046-95 Narrative 95.
The Gisparhlawt's raid on the Kispayaks (pp. 565-7)
[subtitle: or the raid by Legyaerh at the time of the cholera epidemic]
p. 565 "one of the Kisparhlaw'ts opened an umbrella"
p. 566 mention of an epidemic

Ex. 1046-96 Narrative 96.
Legyaerh's raid upon the Git'enmaks (568)

Ex. 1046-97 Narrative 97.
Raid of the Tsimsyan with Legyaerh, against Kispayaks (pp. 569)
p. 569 umbrella
"Civilization came and it prevented these war debts being paid back. The Gov't sent a man of war and it stopped Legyaerhs from ruling the river again.'

Mrs. Cox, who was interpreter for this story in 1924 (told by Simon Gamanoot) said that this had happened in her mother's lifetime.

Ex. 1046-98a Narrative 98a.
Raiders disguised as wolves (pp. 570-)
p. 570 Legyaerh and his umbrella

Ex. 1046-105 Narrative 105.
the Gisparhlaw'ts fight the Hagwelgyet (pp. 595-6)
(p. 595) "The following event happened long after firearms had made their appearance in this country. There had been bad feelings for some time between the Gisparhlaw'ts tribe and the Hagwilgyet 'a Dene tribe], at the Bulkley canyon, near the present Hazelton. Threats passed between them as to their power in warfare. These feelings grew very tense, as the Hagwelget recently had returned from an interior raid which was successful. They were looking for other tribal lands to invade."

p. 595, shot with guns, Tom Hankin, powder, shot, guns, barrel of whisky

F.1 "this happened about seventy-five years before 1927, according to informant. Among those that were there, was Tamks, who was then a young man. It happened before Legyaerh's burning of the Kispayaks village."

| | |
|---|---|
| Ex. 1046-106 | Narrative 106.<br>The establishment of Fort Simpson (p. 597)<br>how Legaic gave a place to the Hudson's Bay Company for them to build the second Fort Simpson and how he then brought his people to live permanently at this site. |
| Ex. 1046-107 | Narrative 107.<br>The Hudson's Bay company moves away from the Nass River (pp. 598-601)<br>[see also #122 re white traders at the Nass prior to est. of Fort Simpson]<br>p. 598 ships' canons, traders "anchored in the area between the Skeena River and Nass River coastline."<br>p. 599 [traders with Aleut hunters] "the traders established themselves on the many small islands near Keraw'e (now known as Big Bay, close to Port Simpson). — the village sites of L.'s people were being taken by the Aleuts after L.'s people moved to Fort Simpson.<br>copy of this whole story — it mentions Aleut sea otter hunting around Fort Simpson |
| Ex. 1046-109 | Narrative 109.<br>When Legyaerh tried to murder Mr. Duncan (pp. 606-11) |
| Ex. 1046-111 | Narrative 111.<br>Sarah Legyaerh (pp. 613-4)<br>p. 613 "Legyaerh . . . had many slaves, whom he kept in two villages. It took three weeks to free them, when the man-of-war came [to the mouth of the Skeena] for that purpose [in 1872?]. |
| Ex. 1046-117 | Narrative 117.<br>The destruction of Gisramawen by Legyaerh (628)<br>Legaic throughout |
| Ex. 1046-118 | Narrative 118.<br>The Gisparhlaw'ts attack the Gitsalas fortress (629-631)<br>Legaic throughout<br>p. 631 small copper shield |
| Ex. 1046-119 | Narrative 119.<br>Legyaerh and Laelt of Kitwanga (631?) |
| Ex. 1046-120 | Narrative 120.<br>How Taimks saved William Duncan's life. (pp. 632-6) |
| Ex. 1046-122 | Narrative 122.<br>Duncan usurped Saru'wen's trading privilege (pp. 639-40) |
| Ex. 1046-126 | Narrative 126.<br>The Larhskeek of Gitsemraelem (661-666)<br>p. 661 copper shields<br>p. 661 copper shields |

## SCHEDULE 5

No. 0843

SMITHERS REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DELGAMUUKW also known as KEN MULDOE, suing on his own behalf and on behalf of all the members of the HOUSE OF DELGAMUUKW and others

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

### AFFIDAVIT

I, Walter Blackwater, hereditary Chief of the Village of Kispiox, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Gitksan Hereditary Chief and as such have personal knowledge of the matters and facts hereinafter deposed to except where they are stated to be on information and belief, in which case I verily believe them to be true.

2. My Gitksan chief name is Diisxw. I am a Chief in the House of Niist, of the Lax Gibuu (Wolf) Clan.

### A. KSI LUU WIT WIIDIT TERRITORY (Kotsine Creek)

3. I have obtained permission from Niist (David Blackwater), a plaintiff in this action, to describe and speak in respect of the Xsi Luu Wit Wiidit and Luu Siigim Baad Txemsem territory claimed by the House of Niist. This territory is located on Xsitxemsem (Nass River) about 90 miles north of the Village of Kispiox.

4. I was instructed about the Xsi Luu Wit Wiidit and Luu Siigim Baad Txemsem territory by: the former Niist (Charles Sampson), and the former Gibeumget (Thomas Sampson), the former Diisxw (my mother Mary Blackwater), the former Gaiyimiaxhaa (Charles Stevens), the former Gwiniiha'osxw (Peter Shanoss), the former Gas Aguun (Alfred Shanoss), the former Hliikatxw (Sam Hope), and the former Asgii (Ester Stevens, my grandmother), all members of the House of Niist; the former Wil Minosik (Jimmy Blackwater, my father), a member of the House of Wii Minosik; and the former Dawamuxw (Moses Stevens, my grandfather), a member of the House of Dawamuxw, all of whom are now deceased. They pointed out the boundary and major landmarks to me when we travelled within the Xsi Luu Wit Wiidit and Luu Silgim Baad Txemsem territory. They told me this territory belonged to Niist.

5. The boundary of the Xsi Luu Wit, Wiidit and luu Silgim Baad Txemsem territory can be described as follows:

Starting on the north side of Xsitxemsem (Nass River) opposite the mouth of Xsi Galliixawit (Sallysout Creek), the boundary runs north to Lip Sganist (un-named mountain on government maps), the boundary then runs northwest along the height of land west of Xsi Luu Wit Wiidit (Kotsine River) to the height of land at the head of Shanoss Creek, here the boundary runs west along the height of land to Xsihl Guugan (Taylor River) near the confluence of Xsu Wii Luu Dagwigit (Upper Taylor River) and Xsihl Guugan (Taylor River), here the boundary runs southwest to the height of land west of Xsu Wii Luu Dagwigit (Upper Taylor River), then runs north along the height of land west of Xsu Wii Luu Dagwigit, here the boundary runs west along the height of land to Sto'ot Xsitxemsem (Bell Irving River) opposite the mouth of Xsi Guut Gwinuuxs (Owl Creek) here the boundary runs northeast to the height of land west of Xsi Maxhia Biluust Maawxs (Konigus Creek), here the boundary runs north to Xsi Maxhia Biluust Maawxs, this point being about 20 miles from the mouth of Xsi Maxhia Biluust Maawxs, the line them runs southeast along the center of Xsi Maxhla Biluust Maawxs (Konigus Creek), to Xsitsemsem (Nass River), here the boundary runs south along the height of land to Wil Maxhla Dox Hla Genx Wii Gwiik (un-named mountain on government maps), the boundary then runs southeast along Wil Maxhla Dox Hia Genx Wii Gwiik and continues southeast along the height of land to the confluence of Luu Silgim Baad Txemsem (Muckaboo Creek) and Xsitxemsem (Nass River), here the boundary crosses Xsitxemsem and runs northeast along the height of land to Loop Guu Hanak (un-named mountain on government maps), here the boundary runs southeast along Loop Guu Hanak for about eleven miles to the head of an un-named creek which flows southeast into Xsitxemsem (Nass River), this creek being just north of the confluence of Xsitxemsem and Xsi Tuutsxwhl Ax (Damdochax Creek), the boundary then runs southwest to and down the west bank of this un-named creek to Xsitxemsem, here it runs south along the center of Xsitxemsem back to the starting point.

6. Other Gitksan Head Chiefs have territories which border on the Xsi Luu Wit Wiidit and Luu Silgim Baad Txemsem territory. Gyolugyet and Skiik'm Lax Ha own territories to the west. Kliiyem Lax Haa and Wii Minosik own territories to the east. Luus and Baskyelaxha own territories to the southeast and south. The Tahltan people own the territories to the north.

7. Geographical features on the boundary and within the territory are:

### LAKES

| | | |
|---|---|---|
| 1. | Dam Sabaiya | (Un-named on government maps, locally known as Dolly Varden Lake) |

### RIVERS AND CREEKS

| | | |
|---|---|---|
| 1. | Luu Silgim Baad Txemsem | (Muckaboo Creek) |
| 2. | Xsu Wii Luu Dagwigit | (is head-waters portion of the Taylor River) |
| 3. | Xsi Luu Wit Wiidit | (Kotsine River) |
| 4. | Xsitxemsem | (Nass River) |
| 5. | Sto'ot Xsitxemsem | (Bell Irving River) |
| 6. | Xsi Maxhla Biluust Maawxs | (Konigus Creek) |

### MOUNTAINS

| | | |
|---|---|---|
| 1. | Maxhla Biluust Maawxs | (un-named on government maps) |
| 2. | Wil Maxhla Dox Hia Genx Wii Gwiik | (un-named on government maps) |
| 3. | Lip Sganisit | (un-named on government maps) |
| 4. | Loop Guu Hanak | (un-named on government maps) |

8. The boundary of the Xsi Luu Wit Wiidit and Luu Silgim Baad Txemsem territory described above and its ownership by the House of Niist has remained the same through my lifetime and I have been told by the people mentioned in Paragraph 4, above, that it has remained the same through previous generations.

## B. TAAX TSINIHL DENDEN TERRITORY

10. I have obtained permission from Niist (David Blackwater), a plaintiff in this action, to describe and speak in respect of the Taax Tsinihl Denden territory claimed by the House of Niist. This territory is located sixteen (16) miles north of the village of Kuldo.

11. I was instructed about the Taax Tsinihl Denden territory and its boundary by the former Baskyelaxha (Jack Tate) a member of the House of Baskyelaxha, the former Gibeumgyet (Thomas Sampson), and the former Diisxw (my mother, Mary Blackwater) all members of the House of Niist. Jack Tate and Thomas Sampson pointed out the boundary and major landmarks to me when we travelled within the Dam Tsinihl Denden territory. They told me this territory belongs to Niist.

12. The boundary of the Taax Tsinihl Denden territory can be described as follows:

Starting on the west bank of Xsan (Skeena River), about a mile and a half south of Tsinihl Denden (Canyon Creek), the boundary follows along the center of Xsan north to the height of land immediately south of Xsisga Maldit Angii'i (Tally Creek), here the boundary runs northwest along the height of land north of Xsi Tsinihl Denden (Canyon Creek), and Xsi Tsinihl Denden Ando'o (Vile Creek) to the height of land south of Xsi Lax Uu Ando'o (un-named creek on government maps), here the boundary runs west along the height of land to Xsitxemsem (Nass River), about a quarter of a mile south of the confluence of Xsi Lax Uu Ando'o and Xsitxemsem, here the boundary runs south along the center of Xsitxemsem to the confluence of Xsi Tsinihl Denden Ando'o (Vile Creek). From here the boundary runs south-east along the height of land south of Xsi Tsinihl Ando'o and crosses Xsi Andap Matx (upper Canyon Creek) about seven miles upstream from Taax Tsinihl Denden (Canyon Lake). Here the boundary continues east along the height of land to Xsan at point of commencement.

13. Other Gitksan Head Chiefs have territories which border on the Taax Tsihihl Denden territory. To the north is another territory owned by Niist, to the northwest is a territory owned by Luus; to the east and south is a territory owned by Gwinin Nitxw; and to the southwest and west is the territory owned by Baskyelaxha.

14. Geographical features on the boundary and within the territory are:

LAKES

| | | |
|---|---|---|
| 1. | Taax Tsinihl Denden | (Canyon Lake) |
| 2. | Dam Ansa Axws | (un-named on government maps) |
| 3. | Dam Angya Ge'en | (un-named on government maps) |

RIVERS AND CREEKS

| | | |
|---|---|---|
| 1. | Xsitxemsem | (Nass River) |
| 2. | Xsan | (Skeena River) |
| 3. | Xsi Tsinihl Denden | (Canyon Creek) |
| 4. | Xsi Tsinihl Denden Ando'o | (Vile Creek) |
| 5. | Wil Skaneexhl Ho'oxs | (un-named on government maps) |
| 6. | Xsi Luu Lak Leexs | (un-named on government maps) |
| 7. | Xsu Luu Masaawit | (un-named on government maps) |
| 8. | Xsi Luu Maa Skeexit | (un-named on government maps) |
| 9. | Xsi Luu Lax Loobit | (un-named on government maps) |
| 10. | Xsi Genuu Djap | (un-named on government maps) |
| 11. | Xsi Andap Matx | (Canyon Creek above Canyon Lake) |
| 12. | Xsisga Maldit Ando'o | (un-named on government maps) |
| 13. | Gasa Lax Loobit | (un-named on government maps) |
| 14. | Xsan Luu Skeexs | (un-named on government maps) |

MOUNTAINS AND HILLS

| | | |
|---|---|---|
| | Andap Matx | (un-named on government maps) |

15. The boundary of the Taax Tsinihl Denden territory described above has remained the same through my lifetime and Jack Tate and Thomas Sampson told me that it has remained the same since long before the arrival of European people here. Jack Tate and Thomas Sampson told me that the House of Niist had owned, harvested and looked after the Taax Tsinihl Denden territory from generation to generation.

16. I have heard the Taax Tsinihl Denden territory described in Gitksan and the territory of Niist.

### C. DAM TUUTSXWHL AX TERRITORY (Blackwater Lake)

17. I have obtained permission from Robert Stevens (Wii Minosik), a plaintiff in this action, to describe and speak in respect of the Dam Tuutsxwhl Ax territory claimed by the House of Wii Minosik. This territory is located about fifty-five miles north of the village of Kisgagaas.

18. I was instructed about the Dam Tuutsxwhl Ax territory and its boundary by: the former Wii Minosik (my father, Jimmy Blackwater), a member of the House of Wii Minosik, by the former Dawamuxw (my grandfather Moses Stevens), a member of the House of Dawamuxw, by the former Asgil (my grandmother, Esther Stevens), by the former Gaiyimiaxha (Charles Stevens), by my mother the former Diiswx (Mary Blackwater), all members of the House of Niist, all of whom are now deceased. They pointed out the boundary and major landmarks to me when we travelled within the Dam Tuutsxwhl Ax territory. They told me this territory belongs to Wii Minosik.

19. The boundary of the Dam Tuutsxwhl Ax territory can be described as follows:

Starting at Wil Skaiyip (Martins Flats), the boundary runs west then south along the height of land to An Damhl (un-named on government maps), here the boundary runs northwest along the height of land north of Xsi Lax Uu (Shilahou Creek) and continues west along the height of land north of Xsi Lax Uu Ando'o (un-named on government maps) to the confluence of an un-named tributary which flows southwest into Xsi Uu Ando'o from an un-named lake, the boundary then runs north to the height of land north of Xsi Lax Uu Ando'o then runs southwest to a point on Xsitxemsem (Nass River), this point being about seven miles south of the confluence of Xsi Tuutsxwhl Ax (Damdochax Creek) the boundary then runs north up the center of Xsitxemsem to the first creek on the east bank of Xsitxemsem (Nass River), just north of Xsi Tuutsxwhl Ax, it then runs north east along the east bank of this un-named creek to Loop Guu Hanak (un-named mountain on government maps), here it runs northwest along Loop Guu Hanak to the height of land at the head of the Naa Baad Xsi Luu Am Maldit (Yaza Creek), it then runs east along the height of land to Dim Geiss Hanni Jok (Panorama Mountain) here the boundary continues east along the height of land north of Xsi Luu Am Maldit (Slowmaldo Creek) to Tsaphl Gwiikw (Groundhog Mountain), the boundary then runs south along the height of land to the west bank of the un-named tributary of Xsi Miin Anhl Gii (Barker Creek) to Xsi Miin Anhl Gil and crosses the creek here and runs south along the height of land to Miin Anhl Gii (un-named mountain on government maps), the boundary continues southeast along the height of land west of Xsan (Skeena River), to Wil Luu Skeexwit (un-named mountain on government maps), at head of Foster Creek, and continues southeast along the height of land at the head of Xsan Six Moohl (Sansixmor Creek) to the east end of Wil Luu Skihl Get (un-named mountain on government maps), here the boundary runs west then south along the height of land south of Xsan Six Moohl (Sansixmor Creek) and Xsu Wil Skaiyip (Damshilgwit Creek) back to Will Skaiyip.

20. Other Gitksan Head Chiefs have territories which border on Wii Minosik's territory. To the north is Geel; to the east is Wii Gaak (Ax Moogwasx); to the southeast is Wiigyet; to the south is Gwinin Nitxw; to the southeast is Luus; to the west is Niist; to the northwest is Kliiyem Lax Haa.

21. Geographical features on the boundary and within the territory are:

LAKES

| | |
|---|---|
| 1. Dam Tuutsxwhl Ax | (Blackwater Lake) |
| 2. Dam Uumxswit | (Wiiminosik Lake) |

RIVERS AND CREEKS

| | |
|---|---|
| 1. Xsitxemsem | (Nass River, a.k.a. Luu Legax Baad Txemsem) |
| 2. Xsi Luu Am Maldit | (Slowmaldo Creek) |
| 3. Naa Baad Xsi Luu Am Maldit | (Yaza Creek) |
| 4. Xsi Tuutsxwhl Ax | (Damdochax Creek) |
| 5. Xsu Guuhiilin | (un-named on government maps) |
| 6. Xsi Genuu Tsap | (Deadfall Creek) |
| 7. Xsi Luu Lax Loobit | (un-named on government maps) |
| 8. Xsi Miin Anhl Gii | (upper Barker Creek) |
| 9. Xsan Six Moohl | (Sansixmor Creek) |
| 10. Xsu Wil Skaiyip | (Damshilgwit Creek) |
| 11. Xsi Gelt Sagat | (un-named on government maps) |

### MOUNTAINS

| | | |
|---|---|---|
| 1. | An Damhl | (un-named on government maps) |
| 2. | Lo'op Guu Hanak | (un-named on government maps) |
| 3. | Dim Geiss Hanil Jok | (Panorama Mountain) |
| 4. | Tsaphl Gwiikw | (Groundhog Mountain) |
| 5. | Miin Anhl Gii | (un-named on government maps) |
| 6. | Guu Hiilin | (Slowmaldo Mountain) |
| 7. | Skanisim Xsan Six Moohl | (Part of Slowmaldo Mountain) |
| 8. | Sas Mihla | (Part of Slowmaldo Mountain) |
| 9. | Galax Uu Dam Tuutsxwhl Ax | (un-named on government maps) |
| 10. | Miin Anhl Gii | (un-named on government maps) |
| 11. | Wil Luu Skeexwit | (un-named on government maps) |
| 12. | Maxhla An Muuxws | (un-named on government maps) |

### OTHER FEATURES

| | |
|---|---|
| Wil Skaiyip | (Part of Martins Flats(*), as located on government maps) |

*Martins Flats is misplaced on government map. Should be area at Fifth Cabin, south side Damshilgwit Lake.

22. The boundary of the Dam Tuutsxwhl Ax territory described above has remained the same through my lifetime and the persons mentioned in paragraph 18 above told me that it has remained the same since long before the arrival of European people here. They told me that the members of the House of Tuutsxwhl Ax territory from generation to generation. They told me that the information on the Dam Tuutsxwhl Ax territory was passed on to them by the former Wii Minosik who is deceased now.

23. I have heard the Dam Tuutsxwhl Ax territory described in the Gitksan feast as being owned by the House of Wii Minosik.

## D. MIIN LAX MIHL TERRITORY

24. I have obtained permission from Kliiyem Lax Haa (Eva Sampson), a plaintiff in this action, to describe and speak in respect of the Miin Lax Mihl territory claimed by the House of Kliiyem Lax Haa. This territory is located on Xsitxemsem (Nass River) about one hundred (100) miles north of the village of Kispiox.

25. I was instructed about the Miin Lax Mihl territory and its boundary by the former Wii Minosik (my father, James Blackwater), a member of the House of Wii Minosik; by the former Niist (Charles Sampson), the former Hliikatxw (Sam Hope), the former Gwiniho'osxw (Peter Shanoss), the former Gas Aguun (Alfred Shanoss), the former Gaiyimlaxhaa (Charles Stevens), the former Diisxw (my mother, Mary Blackwater), the former Asgii (Esther Stevens), all of whom are members of the House of Niist; and by the former Dawamuxw (my grandfather, Moses Stevens); all of whom are now deceased. They pointed out the boundary and major landmarks to me when we travelled within the Miin Lax Mihl territory. They told me this territory belongs to Kliiyem Lax territory. They told me this territory belongs to Kliiyem Lax Haa.

26. The boundary of the Miin Mihl territory can be described as follows:

Starting at the confluence of Luu Silgim Baad Txemsem (Muckaboo Creek) and Xsitxemsem (Nass River), the boundary runs northwest along the height of land west of Xsitxemsem (Nass River), to Wil Maxhla Dox Hla Genx Wii Gwook (un-named mountain on government maps), the boundary continues northwest along Wil Maxhla Dox Hla Genx Wii Gwiik then runs north along the height of land to the confluence of Xsi Maxhla Biluust Maawxs (Konigus Creek) and Xsitxemsem (Nass River), the boundary then runs north along the center of Xsitxemsem (Nass River), for about 3 miles to the confluence of the un-named creek flowing west into Xsitxemsem (Nass River), the boundary then runs northeast along the center line of this un-named creek to the height of land at its headwaters, here the boundary runs southeast along the height of land east of Xsitxemsem (Nass River), to Dim Geiss Hanni Jok (Panorama Mountain), here the boundary runs west and south along the height of land at the head of Naa Baad Xsi Luu Am Maldit (Yaza Creek) to Loop Guu Hanak (un-named mountain on government maps), the boundary then runs southwest back to the starting point.

27. Other Gitksan Head Chiefs have territories which border on the Miin Lax Mihl territory. To the east lies the territory of Geel, while to the south lies the territory of Wii Minosik. To the west is the territory of Niist. To the north is the territory belonging to the Stikines (Tahltan nation).

28. Geographical features on the boundary and within the territory are:

RIVERS AND CREEKS

| | | |
|---|---|---|
| 1. | Xsitxemsem | (Nass River) |
| 2. | Luu Silgim Baad Txemsem | (Muckaboo Creek) |
| 3. | Xsi Wil Luu Skihl An Malgwa | (un-named on government maps) |
| 4. | Xsi Maxhla Biluust Maawxs | (Konigus Creek) |

MOUNTAINS

| | | |
|---|---|---|
| 1. | Dim Geiss Hanni Jok | (Panorama Mountain) |
| 2. | Lo'op Guu Hanak | (un-named on government maps) |
| 3. | Wil Maxhla Dok Hla Genx Wii Gwiik | (un-named on government maps) |

MOUNTAIN AREA

| | | |
|---|---|---|
| 1. | Miin Lax Mihl | (un-named on government maps) |
| 2. | Wil Luu Skihl An Malgwa | (un-named on government maps) |

29. The boundary of the Miin Lax Mihl territory described above has remained the same through my lifetime and the people mentioned in paragraph 25 told me that it has remained the same since long before the arrival of European people here. They told me that the members of the House of Kliiyem Lax Haa had owned, harvested and looked after the Miin Lax Mihl territory from generation to generation.

30. I have heard the Miin Lax Mihl territory described in the Gitksan feast as being owned by the House of Kliiyem Lax Haa.

## E. XSI LAX UU ANDOO'O TERRITORY

31. I have obtained permission from Jeff Harris Sr. (Luus), a plaintiff in this action, to describe and speak in respect of the Xsi Lax Uu Andoo'o territory claimed by the House of Luus. This territory is located about forty-two miles northwest of the Village of Kuldo.

32. I was instructed about the Xsi Lax Uu Andoo'o territory and its boundary by the former Luus (Abel Tait), a member of the House of Luus, Kuldo Lax Gibuu Clan, who is now deceased. Abel Tait pointed out the boundary and major landmarks to me when we travelled within the Xsi Lax Uu Andoo'o territory. He told me this territory belongs to Luus.

33. The boundary of the Xsi Lax Uu Andoo'o territory can be described as follows:

Starting at the confluence of Xsi Lax Uu Ando'o (un-named creek on government maps, runs west to Nass River opposite the head of Shilahou Creek) and Xsitxemsem (Nass River), the boundary runs north along the center of Xsitxemsem (Nass River) for about one and a half miles, here the boundary runs east along the height of land north of Xsi Lax Uu Ando'o (un-named creek on government maps) to Blackwater Peak, here the boundary runs southwest and west along the height of land east and south of Xsi Lax uu Ando'o to Xsitxemsem, about a quarter mile south of the confluence of Xsi Lax uu Ando'o and Xsitxemsem (Nass River), here the boundary runs north along the center of Xsitxemsem (Nass River) back to the starting point.

34. Other Gitksan Head Chiefs have territories which border on Luus' Xsi Lax Uu Andoo'o territory. To the north is Wii Minosik, to the south is Niist, and to the west is another territory of Niist, to the east is the territory of Gwinin Nitxw.

35. Geographical features on the boundary and within the territory are:

| | | |
|---|---|---|
| 1. | Xsitxemsem | (Nass River) |
| 2. | Xsi Lax Uu Andoo'o | (un-named on government maps) |

36. The boundary of the Xsi Lax Uu Andoo'o territory described above has remained the same through my lifetime and Abel Tait told me that it has remained the same since long before the arrival of European people here. Abel Tait told me that the members of the House of Luus had owned, harvested and looked after the Xsi Lax Uu Andoo'o territory from generation to generation. He told me that the information on the Xsi Lax Uu Andoo'o territory was passed on to him by the former Luus who is also deceased.

37. I have heard the Xsi Lax Ando'o territory described in the Gitksan feast as being owned by the House of Luus.

### E. GALAANHL GISST TERRITORY (Slamgeesh River)

38. I have obtained permission from Solomon Jack (Gwinin Nitxw), a plaintiff in this action, to describe and speak in respect of the Galaanhl Giist territory claimed by the House of Gwinin Nitxw. This territory is located about twenty-eight miles north of the village of Kuldo.

39. I was instructed about the Galaanhl Giist territory and its boundary by the former Dawamuxw (my grandfather, Moses Stevens), a member of the House of Dawamuxw; the former Asgii (my grandmother, Esther Stevens); the former Diisxw (my mother Mary Blackwater), the former Gaiyimlaxha (my uncle, Charles Stevens), all of whom are members of the House of Niist; and by the former Wii Minosik (my father, Jimmy Blackwater), a member of the House of Wii Minosik, all of whom are now deceased. They told me this territory belongs to Gwinin Nitxw.

40. The boundary of the Xsi Galaanhl Giist territory can be described as follows:

Starting at a point immediately south of the confluence of Xsisga Maldit Angii'i (Tally Creek) and Xsan (Skeena River), the boundary runs west along the height of land south of Xsisga Mal'dit Angii'i (Tally Creek) then runs northwest along the height of land north of Xsi Tsinihl Denden (Canyon Creek) and Xsi Tsinihl Denden Ando'o (Vile Creek) to the height of land at the head of Xsi Lax Uu (Shilahou Creek), here the boundary runs northwest along the height of land at the head of Xsi Lax Uu to Blackwater Peak, here the boundary runs southeast along the height of land north of Xsi Lax Uu (Shilahou Creek) to An Damhl (un-named mountain on government maps), here the boundary runs north then east along the height of land to Wil Skaiyip (Martins Flats), here the boundary runs east to the height of land west of Xsu Gwasak (upper Slamgeesh River), it then runs north then east along the height of land west and north of Xsu Gwasak (upper Slamgeesh River) to the height of land west of Xsan (Skeena River), the boundary then runs south along the height of land west of Xsan to Maxhla Lax Uut (un-named mountain on government maps), from Maxhla Lax Uut the boundary continues south to the Xsan (Skeena River) west of Gitangas (Village un-named on government maps), here the boundary runs west along the centre of Xsan (Skeena River) back to the starting point.

41. Other Gitksan Head Chiefs have territories which border on Niist's territory. To the north is Wii Minosik; to the northeast is Wiigyet, to the east is Wii Minosik; to the south is another area of Gwinin Nitxw; to the west is Niist; and to the northwest is Luus. Wii Minosik also has privileges along Xsugwa Sak, upper Slamgeesh River.

42. Geographical features on the boundary and within the territory are:

LAKES

| | |
|---|---|
| 1. Dam Galaanhl Giist | (Slamgeesh Lake) |
| 2. Da'm Xsilgwit | (Damshilgwit) |
| 3. Dam Dagaiy | (un-named on government maps) |
| 4. Dam Sililoo | (un-named on government maps) |

RIVERS AND CREEKS

| | |
|---|---|
| 1. Xsan | (Skeena River) |
| 2. Xsi Galaanhl Giist | (Slamgeesh River, below Slamgeesh Lake) |
| 3. Xsu Gwasak | (Slamgeesh River, above Slamgeesh Lake) |
| 4. Xsisga Mal'dit Angii'i | (Tally Creek) |
| 5. Xsigisga Maal't | (un-named on government maps) |

### RIVERS AND CREEKS (continued)

| | |
|---|---|
| 6. Sxi Gisa Genx | (Kitlangus Creek) |
| 7. Xsi Anmaiyhl Gwiikw | (un-named on government maps) |
| 8. Xsi Luu Skihl Get | (un-named on government maps) |
| 9. Xsi Luu Djekwit | (un-named on government maps) |
| 10. Xsu Wil Skaiyip | (un-named on government maps) |
| 11. Xsi Dam Xsilgwit | (un-named on government maps) |
| 12. Xsi Ansa Biins | (un-named on government maps) |
| 13. Xsi Lax Uu | (Shilahou Creek) |
| 14. Xsigisk'amaaldim Ts'im Giist | (Shasiomal Creek) |
| 15. Xsiwilp Laxs | (un-named on government maps) |
| 16. Xsiwil'naa'aat'ixsxw | (un-named on government maps) |
| 17. Xsiwil'minhitxwhl Gan | (un-named on government maps) |

### MOUNTAINS

| | |
|---|---|
| 1. Am Bax Yuua | (Babiche Hill, locally known as S.O.B. Mountain) |
| 2. An Damhl | (un-named on government maps) |
| 3. Miin Anhl Gil | (un-named on government maps) |
| 4. An Maiyhl Gwiikw | (un-named on government maps) |
| 5. Galaanhl Xsi Gisa Genx | (un-named on government maps) |
| 6. Sganisim Am Nax | (Part of Babiche Hill) |
| 7. Maxhla Lax Uut | (un-named on government maps) |

### OTHER FEATURES

| | |
|---|---|
| 1. Luu Unksit | (Fourth Cabin) |
| 2. Anx'miigunt | (un-named on government maps, locally known as Strawberry Flat) |
| 3. Maxhla Sk'a 'Maalt | (un-named on government maps) |
| 4. Wisin Laxmihl | (un-named on government maps) |
| 5. Gisa'an'maldit | (un-named on government maps) |
| 6. Ganeexsim K'abalakw | (un-named on government maps) |
| 7. Wil'Naa Aat'ixswxw | (un-named on government maps) |
| 8. Lax'andilgan | (un-named on government maps) |
| 9. Wil Sk'a 'Malhl Wit | (un-named on government maps) |
| 10. Tsilaasxum Wiigwalkw | (un-named on government maps) |
| 11. Galaa'nhl Giist | (Fifth Cabin) |
| 12. Lax Amaawx An Maiyhl Gwiikw | (un-named on government maps) |
| 13. Andaahl Noxsim Txihlxw | (un-named on government maps) |
| 14. Gitangwalkw | (un-named on government maps) |
| 15. Gitangas | (Village, (un-named on government maps) |

43. The boundary of the Galaanhl Giist territory described above has remained the same through my lifetime and the persons mentioned in paragraph 39 told me that it has remained the same since long before the arrival of European people here. They told me that members of the House of Gwinin Nitxw had owned, harvested and looked after the Galaanhl Giist territory from generation to generation.

44. I have heard the Galaanhl Giist territory described in the Gitksan feast as being owned by the House of Gwinin Nitxw.

## G. ANGODJUS TERRITORY (Poison Mountain)

45. I have obtained permission from Baskyelaxha (William Blackwater), who is the hereditary chief of the House of Baskyelaxha to describe and speak in respect of the Angodjus territory claimed by the House of Baskyelaxha. This territory is located about thirteen (13) miles north of the Village of Kuldo.

46. I was instructed about the Angodjus territory by the former Baskyelaxha; the former Gibeumgyet (Thomas Sampson), and the former Diisxw (Mary Blackwater, my mother), both of whom are members of the House of Niist, and both of whom are now deceased. They pointed out the boundary and major landmarks to me when we travelled within the Angodjus territory. They told me this territory belongs to Baskyelaxha.

47. The boundary of the Angodjus territory can be described as follows:

Starting on the west bank of the Xsan (Skeena River), about a mile and half north of Xsa'anhlimox (O'Dwyer Creek), the boundary runs west along the height of land north of Xsa'anhlimox to cross Xsi Andap Matx (Canyon Creek upstream of Canyon Lake) about seven miles upstream from Taax Tsinihl Denden (Canyon Lake), the boundary then continues northwest along the height of land south of Xsi Tsinihl Denden Ando'o (Vile Creek) to Xsitxsmsem (Nass River, as its confluence with Xsi Tsinihl Denden Ando'o, the boundary then runs down the center of Xsitxemsem (Nass River) to Xsa Galliixawit (Sallysout Creek). Here the boundary runs southeast to the height of land south of Xsi Andap Matx (Canyon Creek, west of Canyon Lake) and Xsi Bagaiyt Xsiisigit (Poison Creek, to the Xsan (Skeena River) about a mile south of Xsi Bagaiyt Xsiisigit, and then continues up the center of Xsan (Skeena River) to where this description began.

48. Other Gitksan Head Chiefs have territories which border on Angodjus territory. To the north is Niist; to the east is another area of Niist's' to the southeast is Gwinin Nitxw; to the south is Wiigyet; to the west is Wii Goob'l.

49. Geographical features on the boundary and within the territory are:

RIVERS AND CREEKS

| | | |
|---|---|---|
| 1. | Xsan | (Skeena River) |
| 2. | Xsitxemsem | (Nass River) |
| 3. | Xsa'anhlimox | (O'Dwyer Creek) |
| 4. | Xsi Bagaiyt Xsiisigit | (Poison Creek) |
| 5. | Xsi Andap Matx | (Canyon Creek) |
| 6. | Xsi Galliixawit | (Sallysout Creek) |
| 7. | Xsi Tsinihl Denden Ando'o | (Vile Creek) |

MOUNTAINS

| | | |
|---|---|---|
| 1. | Angodjus | (Poison Mountain) |
| 2. | Bagaiyt Xsiisigit | (un-named on government maps) |
| 3. | Miinhl Ganu'aloo | (un-named on government maps) |
| 4. | Andap Matx | (un-named on government maps) |

50. The boundary of the Angodjus territory described above has remained the same through my lifetime and the people mentioned in paragraph 46 above, told me that it has remained the same since long before the arrival of European people here. They told me that the members of the House of Baskyelaxha had owned, harvested and looked after the Angodjus territory from generation to generation.

51. I have heard the Angodjus territory described in the Gitksan feast as being owned by the House of Baskyelaxha.

### H. XSI MIIN ANHL GII TERRITORY (Barker Creek)

52. I have obtained permission from Geel (Walter Harris), a plaintiff in this action, to describe and speak in respect of the Xsi Miin Anhl Gii territory claimed by the house of Geel. This territory is located about eighty-five (85) miles north of the Village of Kisgagaas.

53. I was instructed about the Xsi Miin Anhl Gil territory and its boundary by the former Wii Minosik (James Blackwater, my father), a member of the House of Wii Minosik, Kisgagaas Lax Seel (Frog) Clan; my mother, the former Diisxw (Mary Blackwater), a member of the House of Niist, Kisgagaas Lax Gibuu (Wolf) Clan, both of whom are now deceased. They pointed out the boundary and major landmarks to me when we travelled within the Xsi Miin Anhl Gii territory. They told me this territory belongs to Geel.

54. The boundary of the Xsi Miin Anhl Gii territory can be described as follows:

Starting at the confluence of Xsi Miin Anhl Gii (Barker Creek) and Xsan (Skeena River), the boundary runs north up the center of Xsan (Skeena River) to the confluence of Biernes Creek, here it runs west up the center of Biernes Creek to its head, here it runs southwest along the height of land between the Xsan (Skeena River) and Xsitxemsem (Nass River) drainages to Dim Geiss Hanil Jok (Panorama Mountain), here the boundary continues east along the height of land south of the creeks draining east into the Xsan (Skeena River) to Tsaphl Gwiikw (Groundhog Mountain), it then runs south along the east bank of an un-named tributary of Xsi Miin Anhl Gii (Barker Creek) to Xsi Miin Anhl Gii, this point being about 7.5 miles upstream from its confluence with Xsan (Skeena River), here it runs east along the north bank of Xsi Miin Anhl Gii back to the starting point.

55. Other Gitksan Head Chiefs have territories which border on the Xsi Miin Anhl Gii territory. They are Kliiyem Lax Haa to the west, Wii Minosik to the south and Niikyap and Miluulak to the east. The Tahltan people own territories to the north and northwest.

56. Geographical features on the boundary and within the territory are:

RIVERS AND CREEKS

| | |
|---|---|
| 1. Xsan | (Skeena River) |
| 2. Xsi Miin Anhl Gii | (Barker Creek) |

MOUNTAINS

| | |
|---|---|
| 1. Dim Geiss Hanii Jok | (near Panorama Mountain) |
| 2. Tsaphl Gwiikw | (Groundhog Mountain) |

FEATURES

| | |
|---|---|
| Gal Tsaphl Hasiiyeeks | (Jackson Flats) |

57. The boundary of the Xsi Miin Anhl Gii territory described above has remained the same through my lifetime and my father and mother told me that it has remained the same since long before the arrival of European people here. They told me that the members of the House of Geel had owned, harvested and looked after the Xsi Miin Anhl Gii territory from generation to generation. They told me that the information on the Xsi Miin Anhl Gii territory was passed on to them by former Geels (Abraham Geel and Walter Geel) who are now deceased.

58. I have heard the Xsi Miin Anhl Gii territory described in the Gitksan feast as being owned by the House of Geel.

59. I know the boundary and the geographical points in the territory by their Gitksan names. I know some of these by their English names. I do not know all of the English names, directions or mileages which appear in brackets after the Gitksan names in this affidavit. I have been advised by our legal counsel and verily believe that the English names, directions or mileages have been placed in the affidavit on their advice and with the assistance of Neil Sterritt.

SWORN BEFORE ME at the Village )
of Hazelton, Province of British Columbia )
this 13th day of May, 1988. )
)
)
)
)
)
A Commissioner for taking ) WALTER BLACKWATER
Affidavits in British Columbia )

## Index of Schedule 6

**Part 1. Gwinin Nitxw**

(a) Plaintiff's Written Summary .......... 342
(b) Province's Written Summary .......... 347
(c) Canada's Written Summary .......... 354

**Part 2. Gyolgyet**

(a) Plaintiff's Written Summary .......... 355
(b) Province's Written Summary .......... 361
(c) Canada's Written Summary .......... 364

**Part 3. Antgulilbix**

(a) Plaintiff's Written Summary .......... 365
(b) Province's Written Summary .......... 370
(c) Canada's Written Summary .......... 373

**Part 4. Gidsdaywa**

(a) Plaintiff's Written Summary .......... 374
(b) Canada's Written Summary .......... 380

**Part 5. Spookw**

(a) Plaintiff's Written Summary .......... 381
(b) Province's Written Summary .......... 382
(c) Canada's Written Summary .......... 384

**Part 6. Hagwilnegh**

(a) Plaintiff's Written Summary .......... 384
(b) Province's Written Summary .......... 385
(c) Canada's Written Summary .......... 386

**Part 7. Samooh**

(a) Plaintiff's Written Summary .......... 387
(b) Province's Written Summary .......... 389
(c) Canada's Written Summary .......... 393

## SCHEDULE 6 (TERRITORIES)

### 1. Gwinin Nitxw, (Galaanhl Giist (Slamgeesh Lake) Territory)

#### (a) Plaintiff's Written Summary.

Walter Blackwater testified as to the Slamgeesh River territory in his territorial affidavit, Exhibit 605. He was given permission by Solomon Jack to do so. He was instructed about this territory by his grandfather, Moses Stevens, the former Dawamuxw, from the House of Dawamuxw; by his grandmother, Esther Stevens, the former Asgii; by his mother, Mary Blackwater, the former Diisxw; by his uncle Charles Stevens, the former Gaiwimalxa; all of whom are members of the House of Niist; and also by his father, Jimmy Blackwater, who was the former Wii Minosik. All of these Chiefs are now deceased. They told him that this territory belonged to Gwinin Nitxw. The territorial boundary is described in paragraph 40 of his affidavit.

Mr. Blackwater identified and described 43 **geographic features** on the the boundary and within the territory of Slamgeesh by their Gitksan names. Included within this territory is the Gitksan village of Gitangas, named by Mary McKenzie in the description of her adaawk and identified in his evidence by James Morrison.

In his cross, Mr. Blackwater confirmed that the Slamgeesh territory is owned by Gwinin Nitxw. He testified: "He said that was Solomon Jack's territory" (p. 20).

Mr. Blackwater also explained the earlier mapping confusion regarding the ownership of this territory, previously described as belonging to his grandfather, Moses Stevens, Dawamukw.

> I'll try to make it clear to you what went on on this territory here. To begin with it all started with my grandmother who is known as Esther Stevens. Asgii is her Gitksan name. Esther and Gwinin Nitxw were just like sisters back then, and she took Esther and her husband to be caretakers of this territory as long as they want to be, and this is what happened. Esther stayed there until — as long as she could, and when she passed on that territory was given back to Gwinin Nitxw and the reason why I am telling you is because I want it made clear, real clear to you, what that — that this happened and this is why that land returned back to Gwinin Nitxw, because it was his to begin with or hers to begin with.
>
> (p. 21).

He confirmed that Charles Stevens did not claim ownership of the Slamgeesh territory (p. 21).

The Provincial Defendant has focused on this territory in their Argument to challenge the reputation in the community as to the boundaries and the ownership of the House Territories. The evidence presented shows there was apparent confusion with respect to this territory because of the distinction between registered traplines and House territories. There are also other rights within the Gitksan system which led to an **apparent** confusion as to the ownership of the territory. These rights have already been explained and include:

1. Yugwilaatxw Rights (spousal);
2. Amniyetxw and House Ownership;
3. Use Rights and House Ownership.

The real issue raised by the Defendants is whether this territory belongs to Dawamukw or Gwinin Nitxw. There is no suggestion by the Defendants or in the evidence that it is not Gitksan territory.

The 1982 statement of Art Kusick, the former Gwinin Nitxw, explains the apparent confusion:

> "We got this land from the Stikine way before my grandfather's time. We owned Blackwater area but they used it so long they kept it."
>
> Ex. 759 (emphasis added)

Mr. Sterritt clearly explained to the Court why this territory had earlier been referred to as Dawamukw's territory:

> THE Court: But you have said the members of this House, some of them, at least the leading ones, were born and raised up in the Slamgeesh area?
>
> A. No, that's not what I said. What I said was the grandchildren of — who are on one side are Wolf and on another side are Frog, were born and raised up at well, Blackwater-Slamgeesh.
>
> THE Court: Yes?
>
> A. And that they're the ones who were very knowledgeable about the territories and are the ones who were informing me about this relationship.
>
> THE Court: Did I not understand correctly that the — that people from the House of Dawamuxw were there because of this right acquired through marriage and in the Blackwater-Slamgeesh area?
>
> A. Yes. That was the husband.
>
> THE Court: The husband, yes.
>
> A. He was married to the Wolf side, who were parents of or grandparents of Walter Blackwater and David Blackwater.
>
> THE Court: Well, was there only the one person that was in that area by way of — by rights acquired through marriage?
>
> A. Moses Stevens.
>
> THE Court: Just Moses Stevens? And his descendants, where did they live?
>
> A. Well, Moses Stevens' children would be in the House of — of Niist.
>
> THE Court: I see, all right.
>
> A. His descendants — well, his nephews and nieces or his brothers and sisters would be in the House of Dawamuxw.
>
> THE Court: Was this territory originally assigned to Dawamuxw merely because of the presence on the land of Moses Stevens?
>
> A. Yes.
>
> THE Court: I see.
>
> A. That was the reason.
>
> N.J. Sterritt, V. 133, p. 8231

**Thirteen days** after this explanation, Mr. Goldie returned to the subject of this territory during his continued cross-examination of Mr. Sterritt. He referred Mr. Sterritt to a taped interview with Walter Blackwater in 1983. At the commencement of Walter Blackwater's cross-examination at 2:00 PM on September 1, 1988, Mr. Mackenzie advised Plaintiff's counsel that he had not received the tape. Plaintiff's counsel was taken by surprise and had assumed that the tape had been delivered after August 24, 1988. The entire sequence of requests with respect to the 1983 tape was explained to the Court by Plaintiffs' counsel. The Plaintiffs also invited the Defendants to re-open the cross-examination of Walter Blackwater, an invitation which was never accepted.

N.J. Sterritt, V. 141, pp. 8872 - 8877 (copy attached)

Mr. Sterritt agreed that in 1983, Walter Blackwater attributed the Gwinin Nitxw territory at Slamgeesh to Dawamukw.

N.J. Sterritt, V. 137, pp. 8590 - 8591

Mr. Sterritt explained the apparent contradiction in his cross-examination:

> Q. And you — now, Mr. Blackwater obviously changed his mind?

> A. Well, I don't know. He clarified in his own mind as to why Moses Stevens was there, because of his wife, and that it really belonged to the House of Gwinin Nitxw. And at the time he was talking 1983, referring to it in that sense.
>
> N.J. Sterritt, V. 137, p. 8593
>
> Q. . . . . I'm suggesting to you that he changed his view on who owned that territory?
>
> A. I disagree with you. I disagree with you. He — he came to me, either him or David, about a year ago and said he wanted to explain that it really belonged to Gwinin Nitxw; that Moses Stevens was there because of his grandmother, Walter Blackwater's grandmother. And the only explanation that I could offer for that is that Moses Stevens ended up having that registered in his name as a trapline and that that could be the reason, but in fact it's very clear that the area is Gwinin Nitxw's. Solomon Jack had mentioned it to me. I hadn't had anything else to go on, but at some point Walter Blackwater came forward and explained the reason why it was really Gwinin Nitxw's territory and not Moses Stevens, not Dawamuxw.
>
> N.J. Sterritt, V. 137, p. 8594

In further cross-examination, Mr. Sterritt confirmed that Moses Stevens, the former Dawamukw, is the father of Charles Stevens and Mary Blackwater. Mary Blackwater, from the House of Niist is the mother of David and Walter Blackwater.

N.J. Sterritt, V. 138, p. 8664 (cross)

In the course of cross-examination of Mr. Sterritt, it was urged on Mr. Sterritt that the Blackwater affidavit was "a sham". However, this proposition was never put to Walter Blackwater. In fact, the Defendant did not re-open the cross-examination of Mr. Blackwater after receipt of the 1983 tape although there was an opportunity to do so while cross-examining other affidavit witnesses in Smithers in November and December, 1988 and Mr. Macaulay suggested he might do so.

N.J. Sterritt, V. 124, p. 7638

N.J. Sterritt, V. 138, p. 8628

There is no suggestion that Mr. Blackwater or his House (Niist) would benefit from the apparent change from Dawamuxw to Gwininitxw. In any event, the territory was not suggested by Mr. Blackwater to belong to the House of Niist. In fact, the only explanation for the difference in Mr. Blackwater's evidence was that he was confusing the rights of his grandfather through Yuugilaatxw in 1983 with the House which owned the territory. It is important to remember in this context that Moses Stephens was one of the principle teachers of Walter Blackwater with respect to the boundaries of this territory.

The only conclusion to be taken from Defendants failure to cross-examine Walter Blackwater directly on the 1983 statement is that the Defendants did not want Mr. Blackwater to explain the reason for the difference between the 1983 tape and his affidavit. They knew his explanation would undermine their argument based on the 1983 tape.

Mr. Solomon Jack explained in November 1982 that:

> "Gwinin Nitxw let him (Dawamukw) trap in there his dad was from our clan like."
>
> N.J. Sterritt, V. 139, p. 8715

This was Solomon Jack's explanation as to why Dawamukw trapped on part of the territory. Mr. Sterritt explained that Solomon Jack is here referring to Moses Stevens trapping and not his ownership of that territory. He stated in cross-examination by Mr. Goldie:

> Q. Yes. Now, so we have it so far as any material that is available to us, a certain cnsistency; Art Kusick, Solomon Jack and Walter Blackwater all suggesting that the territory — Slamgeesh Territory was Dawamuxw?
>
> A. No. What Art Kusick is saying and Solomon Jack are saying is that Dawamuxw is in that area, but Solomon says it's because of his — he mentions because of the father, Dawamuxw's father.
>
> Q. Yes.
>
> A. It's what he says on the tape, but he also says that it is the territory, it's Wolf Territory under Gwinin Nitxw. Walter also comes — and Walter comes — and also what Solomon is saying is that they are trapping in that area. That Moses Stevens is trapping. He doesn't say that he owns it, but in the terms of what we were doing in terms of defining, or what he was describing was where they trapped, but he has already established that there. It wasn't — I still don't see that Walter was saying — or pardon me, Solomon was saying it in a hostile way in any way at all in terms of a conflict. Eventually Walter Blackwater came forward to me and pointed out that the reason Dawamuxw was there is because of his wife, because of the family.
>
> Q. All right.
>
> A. And it's Gwinin Nitxw land, and to me the sequence from 1982 to 1983 to 1988 is just building on the same information and them sorting through that.
>
> N.J. Sterritt, V. 139, p. 8718 (cross)

Although Mr. Sterritt and Mr. Blackwater referred to the clarification of the boundaries of this territory by way of the September 6, 1986 helicopter flight, the Defendents ignore the evidence of the detailed record of the naming of places and boundary location which occurred on that flight. Walter and David Blackwater and Nancy Supernault travelled with Neil Sterritt through Slamgeesh on that trip. The photos of that flight and the notes of that flight are in evidence. (Ex. 377, 487, 654 - 656, 984 (12))

Thirty-two days after Mr. Goldie first cross-examined Mr. Sterritt with respect to the Slamgeesh territory, he returned to the issue yet again and referred to field notes of Mike Morrell in 1979. Yet again, Mr. Sterritt explained the territory as belonging to Gwinin Nitxw:

> Q. And this too he records as belonging in the territory of Dawamuuk?
>
> A. Yes. And this is the — what Walter pointed out to me that it was Moses Stevens who was married to a member or to a wolf and that it was really Gwinin Nitxw's territory. It's the same area that is properly Gwinin Nitxw's.
>
> N.J. Sterritt, V. 142, p. 8963

The Defendants did not cross-examine Mr. Walter Blackwater with respect to:

1. 1983 tape of interview
2. January 12, 1987 interview by N.J. Sterritt with Walter Blackwater (V. 136, p. 8461)
3. M. Morrell interview with David Blackwater and Bobby Stevens respecting the Slamgeesh territory.

Since they elected not to re-open their cross-examination of Walter Blackwater, the sworn evidence in Court is that the Slamgeesh territory belongs to Gwinin Nitxw. This is consistent with:

(1) Affidavit of Walter Blackwater (Ex. 605)

(2) Sworn evidence of Walter Blackwater

(3) Sworn evidence of N. J. Sterritt —
V. 133, p. 8231 (cross)
V. 137, p. 8593 - 8594 (cross)
V. 138, p. 8664 (cross)
V. 139, p. 8715 (cross)
V. 139, p. 8718 (cross)
V. 142, p. 8963 (cross)

(4) The 1982 interview with Art Kusick.

(5) Sworn evidence of Solomon Jack (Ex. 597A)

(6) Sworn evidence of James Morrison who described the territory.

After both Mr. Blackwater and Mr. Sterritt were examined, the Defendants cross-examined Gwinin Nitxw himself, Solomon Jack, on December 6, 1988. (Ex. 597 A)

It becomes even more clear that this territory was always Gwinin Nitxw's in Solomon Jack's cross-examination. When asked whether Gwinin Nitxw lost the Slamgeesh territory, he stated:

> Q. All right. But when you answer that, you thought that you had lost your territory?
>
> A. No, I didn't. I said we lost it through the white man's law by registering it by them registering that trapline.
>
> Q. And who was the person that registered the trapline?
>
> A. Moses Stevens, as far as I know. I'm not — I haven't even looked at the register, but I heard he registered it.
>
> Q. Well, now you say that you never lost the territory at all?
>
> A. No. But we just lost it through the white man's, that's what I supposed to say on that.
>
> . . . . .
>
> A. The reason why our people before me — I don't know it was after I was born or before, but Moses Stevens, his father came out of Gwinin Nitxw's House and yet he wanted to trap on Gwinin Nitxw's trapline. So they told him, according to my grandmother, they told him to use Slamgeesh Lake, and it's — that area is so big we couldn't — we couldn't use it, we couldn't trap on it all the time, eh. So they cut — actually, the southern part is closer to Kisgagaas, that's why my grandparents trap there all the time. And the first thing they do with that thing was register it on the Moses Stevens. That's what they told me, I didn't see the register of what, or whether it wasn't registered.
>
> S. Jack, Ex. 597A, pp. 28 - 29

The Defendants never put the suggestion that this territory belonged to Dawamukw to Solomon Jack.

In summary: (1) the sworn testimony of all witnesses demonstrates that the Slamgeesh territory belongs to Gwinin Nitxw;

(2) The early statement of Art Kusick, the former Gwinin Nitxw, is consistent with this;

(3) All witnesses explained why Dawamuxw had rights of access to this territory;

(4) The Defendants refused to seek an explanation from Walter Blackwater although invited to do so.

With respect to the reputation evidence, Walter Blackwater's grandfather taught him the boundaries of this territory (Ex. 605A, p. 25). He is now deceased.

The Plaintiffs have never denied that the imposition of the trapline registration system on their Territory has impacted the Gitksan and Wetsuweten system. In this case, the freezing in time of the trapline registration by issuing it to Moses Stephens, a chief with privileged rights of access, has led to some confusion. Nevertheless, when one takes all the evidence together, the community reputation is that this territory belongs to Giwninitxw. The source of this community reputation is the deceased chiefs who passed on the boundaries and the ownership to the living Gitksan. This is not to say that the living chiefs do not discuss the House territories and boundaries among themselves. That is an obvious aspect of any reputation within a community. To suggest that the fact of such discussions makes the reputation evidence inadmissible, as the Provincial Defendant does, is to make a mockery of the reputation evidence exception enunciated by the Courts. No aboriginal society with an oral history would be able to prove their territory ownership. This is precisely the absurd result that Blackburn, L.J. rejected in the Milirrpum case.

The Court should accept the reputation evidence that this is Gwininitxw territory. If the Court accedes to the Provincial argument, it should recognize the territory as belonging to Dawamuxw. In either case, there is no argument that the territory is not Gitksan territory and properly included in the Territory claimed in this case.

### (b) Province's Written Summary.

#### Introduction

The Slamgeesh claim area appears on map 9A north of the Skeena River just west of its confluence with the Sustut. It is about 28 miles north of Kuldo. Marvin George obtained the information about the Slamgeesh boundaries from the affidavit of Walter Blackwater sworn May 13, 1988 (Ex.605; Tr.217, p.15767, 1.30 to p.15769, 1.20; p.15771, 1.44 to p.15772, 1.4). Evidence Summary. It is submitted that the Blackwater evidence as to boundaries and claims to the Slamgeesh territory is inadmissible. It is unreliable and should be accorded no weight. It is submitted that there is much evidence contradicting the Blackwater affidavit. It is submitted further that the affidavit evidence was probably obtained from living informants in addition to, or more probably instead of, the deceased informants to which the affidavit refers. It is therefore hearsay evidence, not evidence of a common reputation, and is inadmissible. Even if admissible, due to conflicts with Blackwater's earlier statements to Sterritt and with the evidence of other informants, the evidence is not reliable. It is also unreliable because of the fundamental flaws in the territorial affidavit preparation. The Blackwater affidavit and map 9A show the Slamgeesh territory as being claimed by Gwinin Nitxw. However there is considerable evidence that until 1988 much of the territory was attributed to Dawamuxw or possibly Niist. It is submitted that there are several maps which show boundaries and ownership of the Slamgeesh territory conflicting with those on map 9A as follows: Ex.774, Tab 22, p.3-77 sketch — November 18, 1982; Ex.725 sketch — December 15, 1982; Ex.725, 726 — about May 1983; Ex.102 — October 17, 1985; Ex.420 — August 21, 1986; Ex.605-2 — August 7, 1986; and Ex.5 — May 20, 1987.

Blackwater Affidavit. Walter Blackwater described the Slamgeesh territory in his territorial affidavit (Ex.605), Section F. In paragraph 38, he deposed that the territory was claimed by the House of Gwinin Nitxw. In paragraph 39, he deposed that he was instructed about the territory by his grandfather, Moses Stephens; his grandmother, Esther Stephens; his mother, Mary Blackwater; his uncle, Charles Stephens and his father, Jimmy Blackwater, all of whom were deceased. They told him the territory belongs to Gwinin Nitxw. In paragraph 40 Blackwater gave a metes and bounds description of the boundary which, subject to a minor drafting error, is the same as that shown on map 9A. George referred to the drafting error at Tr.217, p.15773, ll.18-43. In paragraph 43 Blackwater deposed that the boundary of the territory has remained the same throughout his life and his informants mentioned in paragraph 39 told him that it had remained the same since long before the arrival of the European people. They told him that the members of the House of Gwinin Nitxw had owned, harvested and looked after the territory from generation to generation. In paragraph 44 Blackwater deposed that he had heard of the territory being described in the Gitksan feast as being owned by the House of Gwinin Nitxw. Sterritt Examination in Chief. As noted above, the boundaries on Solomon Jack's (Gwinin Nitxw) interrogatories map (Ex.420) of August 21, 1986 conflict with those on map 9A. Sterritt purported to explain the changes to the Gwinin Nitxw boundary in the Slamgeesh area between Ex.420 and map 9A. He received information concerning the boundary change from Solomon Jack about March 1988. He was not sure if there was a note on these instructions. [No such notes have been disclosed.] (Tr.125, p.7706, ll.11-36). Sterritt received the original boundary information and passed it on to Marvin George, who drew Ex.420. The information depicted on Ex.420 is as at the time Sterritt received it (Tr.125, p.7698, ll.6-15). According to Sterritt, Ex.420 is not complete in the sense that it does not reflect the later information Sterritt received from Solomon Jack (Tr.125, p.7698, ll.16-24). In accumulating information about various territories, Sterritt used topographic working maps filed in a "white binder". On these maps, Sterritt marked geographic features with numbers in circles. These are features identified either in an interview or on a field trip by hereditary chiefs or other knowledgeable persons. There are lines and colour-coding to determine boundaries between separate territories based on Sterritt's information at the time. The hereditary chief's name appears in each territory. The colour code is brown for Wolf, purple for Fireweed, green for Frog and yellow for Eagle (Tr.130, p.7999, ll.23 to 34). The Slamgeesh area appears on Ex.725, NTS map No.94D entitled "McConnell Creek". Sterritt identified the writings, the lines and the colouring on Ex.725. The colouring and the lines are around borders or creeks which have been identified and the numbers appear on various features. The colour-coding on the maps is the same as the other white binder maps. The information written on the margins of the map is also in Sterritt's handwriting (Tr.130, p.8001, 1.32 to p.8002, 1.9). On Ex.725 and Ex.726, the map adjoining Ex.725, Sterritt coloured the Slamgeesh area boundaries in purple, which is the code for Fireweed, (Ex.725 and Ex.726) and noted the chief's name Dawamuk within the Slamgeesh area boundaries (Ex.726; Tr.130, p.8002, 1.33 to p.8003, 1.31). Sterritt also prepared land use reference data sheets which are summary sheets accompanying the topographic maps (Tr.130, p.8006, ll.14-19). Sterritt identified his handwriting on the land use summary sheets for Ex.725 marked as Ex.725A (Tr.130, p.8007, ll.34-43). The summary sheets give the names of the geographical features which are identified by numbers on the topographic maps (Tr.130, p.8001, ll.6-14). On Ex.725A there are several geographical features within the Slamgeesh territory identified on the summary sheet as being the property of Dawamuxw, Kisgegas Fireweed Clan. These geographical features are all identified in the Blackwater 1988 affidavit as being within the Slamgeesh territory claimed by Gwinin Nitxw. Several of the features so identified are as follows:

Description of No. Name Geographical Feature 23 Wilskayip Hill 24 Dam Silgwit Lake 26 Galangiis Lake 29 Lax Andilgan Beaver Area 30 Xsisga Mal't Creek 32 Ta'm Dakai Lake 33 Xsugwasak River 77 Skanism Am Nax Mountain 84 Xsi Gala'a Nhl Giist River 90 Xsa Ansa Biins Creek Ex.725A The maps, Ex.725 and 726, and the land use summaries, Ex.725A and 726A, are contained in the white binder which Sterritt prepared on the basis of information received from various informants. He gave this binder to Marvin George for use in preparing maps (Tr.130, p.7997, ll.23-34; Tr.216, p.15719, 1.42 to p.15720, 1.7). Marvin George then drew Ex.102, on which the area at Slamgeesh, coded as 3F25, is attributed to Dawamuxw (Tr.133, p.8224, ll.17-45). When Glen Williams and Sterritt gave instructions to Marvin George for preparation of Ex.102 in October 1985, they believed that Dawamuxw had the territory at Slamgeesh. Sterritt testified that Moses Stephens, Walter Blackwater's grandfather, was Dawamuxw and was married to Asgii, Blackwater's grandmother. She was Wolf and Dawamuxw, who as her husband had rights to her territory, was in the Slamgeesh area. The Gitksan term for those rights is Yugwilaat (Tr.133, p.8225, 1.45 to p.8226, 1.10). Subsequently Walter Blackwater, David Blackwater and Nancy Supernault told Sterritt that Dawamuxw was not in that area. They identified Niist and subsequently Gwinin Nitxw as the owner (Tr.133, p.8226, ll.13-18).

Sterritt explained that Gwinin Nitxw is closely related to the House of Niist. Gwinin Nitxw had a territory on the south side of the Skeena. Niist was on the territory on the west and north side of the Skeena (Tr.133, p.8226, ll.18-25). At the time that Ex.102 was prepared, Sterritt's information was that Dawamuxw owned the Slamgeesh territory (Tr.133, p.8226, ll.43-47). The House of Dawamuxw appointed a spokesperson who was delegated to discuss House matters. Sterritt had no personal communications with the current chief Dawamuxw after the appointment of the spokesperson. Sterritt does not have any notes of the House meeting with the Dawamuxw family in 1984 or 1985 that resulted in the virtual disappearance of any territorial claims by the House (Tr.133, p.8229, ll.3-30). Sterritt did not recall whether the issue of the territory was discussed at the meeting with Dawamuxw family. He obtained information about Dawamuxw's territory from people who lived in the area. It had been mentioned that Moses Stephens, Dawamuxw, was in that area, but on further examination it became clear that he was there because of Yugwilaat. The people who lived in the area were Walter Blackwater, Nancy Supernault and David Blackwater (Tr.133,p.8230, ll.7-28). It was Sterritt's discussions with Walter Blackwater, Nancy Supernault and David Blackwater that led him to the belief that this was the territory of Dawamuxw (Tr.133, p.8230, ll.24-34). This was inconsistent with Sterritt's previous statement that these informants told him Dawamuxw was not in that area (cf. Tr.133, p.8226, ll.13-18). Sterritt attempted to explain why Moses Stephens was at Slamgeesh. The grandchildren of Moses Stephens, who on one side are Wolf and on the other side are Frog, were born and raised at Blackwater-Slamgeesh. They are knowledgeable about the territories and informed Sterritt about the relationship. People from Dawamuxw were in the Slamgeesh area because of the right acquired through marriage. The husband was married to the Wolf side who were grandparents of Walter and David Blackwater. Moses Stephens was the only person who was in the area by way of rights acquired through marriage. His children are in the House of Niist. His nieces, nephews, brothers and sisters are in the House of Dawamuxw (Tr.133, p.8231, ll.4-34). Sterritt stated that this territory was originally assigned to Dawamuxw merely because of the presence on the land of Moses Stephens (Tr.133, p.8231 ll.35-38).

Sterritt Cross-examination. Walter Blackwater was cross-examined on his affidavit on September 1 and 2, 1988. Prior to that cross-examination, counsel for the Province had requested production of Plaintiffs' document 5594, an audio tape of Neil J. Sterritt's interview with Blackwater on May 22, 1983. Requests were made in December 1987, July 8, 1988 and August 24, 1988. Production was denied on the basis of privilege (Ex.605A, p.1, ll.8-21; Tr.137, p.8577, ll.15-35). During Blackwater's cross-examination on September 1, counsel was under considerable disadvantage because the tape of the 1983 interview was not made available (Tr.138, p.8628, ll.3-44). The cross-examination was conducted through an interpreter. The tape, however, demonstrated Blackwater's familiarity with the English language. Plaintiffs' counsel did not produce the audio tape until September 21, 1988. Sterritt was cross-examined on this subject on October 11, 1988 (Tr.137, p.8577, ll.43-44). After receipt of the audio tape, Plaintiffs' document 5594, a transcript of the tape (Ex.745) was prepared by counsel for the Province. It is submitted that Blackwater's May 13, 1988 affidavit contradicted his statements to Sterritt during the interview on May 22, 1983. In the affidavit, paragraph 38, Blackwater deposed that the Slamgeesh territory is the territory of the House of Gwinin Nitxw, Solomon Jack (Tr.137, p.8580, ll.5-27). In 1983, however, Blackwater believed that the Slamgeesh territory belonged to Dawamuxw, Moses Stephens (Tr.137, p.8581, l.4 to p.8589, l.47). The Slamgeesh territory as described by Blackwater appears on Ex.102 as 3F25 (Tr.137, p.8590, ll.15-37). Sterritt accepted Blackwater's attribution to Dawamuxw in 1983 and that is reflected in Ex.102 which attributes that Slamgeesh territory to Dawamuxw (Tr.137, p.8590, ll.38-43). All the features of the Slamgeesh territory which Blackwater described in his interview in 1983 are stated in his 1988 affidavit to be the property of Solomon Jack, Gwinin Nitxw (Tr.137, p.8590, l.44 to p.8591, l.4).

In his cross-examination on his territorial affidavit in September 1988, Blackwater was quite positive that Dawamuxw did not own the Slamgeesh area (Tr.137, p.8592, l.6 to p.8593, l.14). Sterritt said that Walter Blackwater or his brother David, came to Sterritt sometime in year prior to September 1988 for the purpose of explaining the change in claimant from Dawamuxw to Gwinin Nitxw (Tr.137, p.8594, ll.24-36).

In 1983, Blackwater stated that the creek that runs into Dam Xsilgwit belonged to Dawamuxw (Ex.745, p.16). The interview proceeded: "NJS: So he owned all the land around that, eh? WB: That's right, yeah. Right up to the mountain." Ex.745, pp.16-17. In paragraph 42 of his affidavit, Blackwater states that Da'm Xsilgwit, Damshilgwit, is a lake which is a geographical feature on the boundary and within the Slamgeesh territory owned by Gwinin Nitxw (Ex.605, paragraph 42). In his affidavit, Blackwater also describes Shilahou Creek as falling in the territory of

Gwinin Nitxw (Tr.137, p.8597, ll.6-10). In 1983, Blackwater was very doubtful about the ownership of that creek (Tr.137, p.8597, ll.11-34). Sterritt agreed that in 1983, Blackwater had forgotten some of the names of geographical features in the territories described in the 1988 affidavit. However Sterritt then said that Blackwater had recalled the names during a field trip with Nancy [Supernault], David [Blackwater] and Sterritt in 1986 (Tr.137, p.8606, ll.23-40). Blackwater had also forgotten the name of Vile Creek which flowed out of the Canyon Lake area into the Nass River (Tr.137, p.8608, 1.44 to p.8610, 1.28). In his 1988 affidavit, however, he deposed that he knew Vile Creek and he had travelled it (Tr.137, p.8610, ll.29-35). Sterritt agreed that as far as he had heard the tape, the transcript, Ex.745, was a fair reproduction of the interview (Tr.138, p.8619, ll.4-11). Mary Blackwater, Blackwater's mother and one of his informants with respect to the Slamgeesh territory, died in 1974 (Tr.138, p.8634, ll.32-42; Ex.774, Tab 12, p.29 [d.1973]). Charles Stephens died in the late 1960s (Tr.138, p.8637, ll.5-8) Jimmy Blackwater died in 1966 (Tr.138, p.8637, ll.21-27; Ex.774, Tab 12, p.29 [d.1964 or 1966]).

During the 1983 interview, Sterritt was seeking to revive Blackwater's memory of both the boundary of Dawamuxw and the boundary between Dawamuxw and Luus (Tr.138, p.8642, 1.11 to p.8644, 1.42). As a result of Sterritt's interview with Blackwater in 1983, Sterritt coloured in purple the territory of Dawamuxw as shown on the topographical map, Ex.725 (Tr.138, p.8645, ll.25-38). On the left-hand margin of Ex.725, Sterritt identified the southern boundary of the Slamgeesh territory as Dawamuxw (Tr.138, p.8645, ll.42-46). On the left-hand margin of Ex.725, Sterritt printed a note: "December 15, 1982, at Sam Hope Feast. Walter Blackwater says Dawamuxw comes up creek to main [branch] and Gwinin Nitxw on other side." Tr.138, p.8646, ll.1-4; Ex.725 Sterritt also drew a small sketch illustrating this information in the left-hand margin of Ex.725 (Tr.138, p.8646, ll.7-10). That sketch on Ex.725 shows Dawamuxw as owning territory on Slamgeesh Creek (Ex.725).

In 1982 Blackwater was consistent in his recollection with the information he gave to Sterritt in May 1983 (Tr.138, p.8646, ll.11-14). The informants upon which Blackwater relies in his 1988 affidavit (Ex.605) with respect to the territory which is identified as Dawamuxw's territory on Ex.725 were all dead by 1982 (Tr.138, p.8646, ll.22-27). They cannot be the source of information between 1983 and 1988. On Ex.726, another topographical map, Sterritt has written on the right-hand margin the word "Dawamuxw" identifying the territory of Dawamuxw (Tr.138, p.8646, ll.33-42). The boundary of the Dawamuxw territory as shown on Ex.726 reflects Sterritt's understanding of what Blackwater was saying in 1983 (Tr.138, p.8646, 1.43 to p.8647, 1.4). Sterritt agreed that the boundary annotations which Sterritt put on Ex.725 and 726 were his interpretation of what Blackwater was saying during the interview in 1983 (Tr.138, p.8648, 1.42 to p.8649, 1.24). Sterritt indicated on Ex.725 and 726 the point on the map referred to during the interview in 1983 when Sterritt said at Ex.745, p.50: "O.K and then um . . . I'm wondering which way he comes down . . . where him and Luus have the boundary . . . hmm . . . it's . . . must come down through (unintelligible) Xsisga Mal'dit, eh?" Tr.138, p.8650, 1.35-38. During the 1983 interview Sterritt referred Blackwater to what other informants had said (Tr.138, p.8652, ll.3-40). Sterritt also had a map there to assist in the 1983 interview (Tr.138, p.8652, 1.37 to p.8655, 1.13). Sterritt utilized information he received from Blackwater in 1983 and passed it onto Marvin George who drew Ex.102 (Tr.138, p.8663, ll.16-18) on which Dawamuxw was identified as claimant of the Slamgeesh territory (Tr.138, p.8664, ll.4-10). Some changes were made to the boundaries of the Slamgeesh territory between Ex.102 dated October 1985 and Ex.5 dated May 1987. For example, Slamgeesh became Niist-Gaiyemlaxhaa. That is the name of Charles Stephens, the son of Moses Stephens who held the name Dawamuxw (Tr.138, p.8664, ll.20-39). Subsequently as between Ex.5 and map 9A, the Slamgeesh territory is now attributed to Gwinin Nitxw (Tr.138, p.8665, ll.11-19). In preparing the Blackwater affidavit, Ex.605, Sterritt followed his normal procedure of drafting the affidavit, taking it to Blackwater, discussing it with him, and producing subsequent drafts until Blackwater was satisfied with the affidavit (Tr.138, p.8666, ll.12-15). In Sterritt's cross-examination, a number of places were identified where Blackwater in his interview in 1983 differed from his affidavit of 1988. These are the differences between the interview in 1983 which formed part of the material for Ex.102 and the affidavit, Ex.605, of May 1988 which formed the basis of map 9A (Tr.138, p.8666, ll.16-26). Blackwater and Sterritt had certain views about territorial boundaries in May 1983 which found their way into Ex.102 (Tr.138, p.8666, ll.35-42). Sterritt and Blackwater had different views of the territorial boundaries in May 1988 than they had in May 1983 (Tr.138, p.8667, ll.22-27). In May 1983 the informants to which Blackwater refers in his 1988 affidavit (Ex.605) had passed away (Tr.138, p.8668, ll.9-12). The Blackwater affidavit, Ex.605, was put forward as based upon information Blackwater had received from deceased persons (Tr.138, p.8668, ll.22-36). None of the informants to whom Blackwater refers in his 1988 affidavit, Ex.605, was a Sterritt informant (Tr.138, p.8668, ll.30-38). For every territorial affidavit, the informants upon whom the deponent relied had to be deceased at the time the affidavit was sworn (Tr.138, p.8669, ll.42-46). The reason for the reliance upon deceased informants was that information from living informants would be treated as hearsay (Tr.138, p.8669, ll.5-26).

Sterritt did not know to what extent Blackwater might have talked to other people but that was a process that all of the hereditary chiefs liked to engage in, to go to other people to confirm and verify what they know or what they understand (Tr.138, p.8670, ll.36-44). Sterritt confirmed that he prepared the first draft of the Blackwater affidavit and brought it to Blackwater for review (Tr.138, p.8670, ll.36-37; p.8671, ll.42-46). Sterritt made notes of his interview with Art Kusick, a former Gwinin Nitxw, on November 2, 1982. Kusick stated: "We got this land from the Stikine way before my grandfather's time. We owned Blackwater area but they used it so long they kept it." Tr.139, p.8711, ll.25-29; Ex.759: Sterritt says Kusick is speaking generally about the area to the east of the Skeena and also about the Slamgeesh Lake territory. The first map Ex.102 of October 1985 attributes the Slamgeesh area to Dawamuxw, code 3F25 (Tr.139, p.8712, ll.4-21). Art Kusick died about 1985 before Walter Blackwater explained to Sterritt that the Slamgeesh area should be attributed to Gwinin Nitxw (Tr.139, p.8713, 1.36 to p.8714, 1.10). Sterritt says that Walter Blackwater "not that long ago sat down and explained the whole relation there and said that it was Gwinin Nitxw." (Tr.139, p.8713, ll.15-18). On November 18, 1982, Sterritt interviewed Jack. On the tape, which was played in Court, Solomon Jack said that Gwinin Nitxw traps to the east side of Slamgeesh and that Dawamuxw is on the west side. Sterritt continued: "NJS: Dawamuxw has a lot of ground in here. SJ: Might be him. NJS: I think he was." Tr.139, p.8714, ll.44-47 The tape continued as follows:

> "NJS: Okay. So the boundary would be where the Slamgeesh entered the Skeena, is that right? He wouldn't go anywhere up the Slamgeesh? SJ: No. NJS: So you would have the watershed of Gitangus and all the creeks between there and the Skeena? SJ: M'hm. NJS: Okay. Now, that's good." Tr.139, p.8716, ll.32-42

Jack states that Gwinin Nitxw traps to the east side of the Slamgeesh and Dawamuxw to the west side and that Gwinin Nitxw does not go west (Tr.139, p.8717, ll.10-13). Jack's evidence is consistent with the diagram which Sterritt drew on Ex.725 based on Walter Blackwater's information at Sam Hope's feast on December 15, 1982 (Tr.139, p.8717, ll.14-28). In 1986 Nancy Supernault told Sterritt that the Slamgeesh area belonged to her father, Charles Stephens, Gaiyemlaxhaa (Tr.139, p.8719, 1.11 to p.8720, 1.15). On February 16, 1988, Supernault told Sterritt again that Slamgeesh was her father's territory (Tr.139, p.8720, 1.32 to p.8722, 1.13). On Ex.5 the Slamgeesh territory is attributed to Niist, Gaiyemlaxhaa, in accordance with Nancy Supernault's advice to Sterritt. Sterritt noted the interview with Solomon Jack on November 18, 1982 in his field notes. He recorded Jack as stating that Gwinin Nitxw traps to the east side of Slamgeesh and Moses Stephens to the west side. Sterritt recorded this accurately. (Tr.141, p.8922, ll.19-42; Ex.774, Tab 4, p.132). Sterritt also noted information received from Peter Muldoe and Albert Tait on July 4, 1983. Albert Tait said that "Luus owns from fifth cabin, just for the winter, along Shilahou to Xsi lax uui, otherwise Dawamuxw owns Shilalou." Tr.141, p.8930, 1.45 to p.8931, 1.2 Sterritt says that this is consistent with Walter Blackwater's information about where Luus is at the end of Shilahou or Xsi lax uu (Tr.141, p.8931, ll.4-7). However Blackwater's 1988 affidavit, Ex.605, Section F, stated that Shilahou is in the Gwinin Nitxw territory (Ex.605, p.13, Rivers and Creeks Item 13).

Sterritt noted information received from Walter Blackwater that "Dawamuukw got Galaanhl Giist by Xsiisxw, it used to belong to Gwinin Nitxw." That was the basis for Dawamukw's ownership of the Galaanhl Giist territory. Dawamukw got the territory by virtue of a peace settlement. That is what Blackwater told Sterritt at the time (Tr.141, p.8935, ll.19-38; Ex.774, Tab 12, p.28). On a topographic survey data sheet dated April 2, 1979, Mike Morrell recorded information received from David Blackwater identifying an alpine area in the Slamgeesh Range about five miles east of Slamgeesh Lake known as Wulam in the territory of Dawamuxw (Tr.142, p.8962, ll.24-39; Ex.774, Tab 22, p.4-213). On the next topographic data sheet there is another note by Morrell on April 2, 1979 with informants identified as David Blackwater and Bobby Stephens. Lakandilgan, an area on the Slamgeesh River, belongs to Dawamuxw (Tr.142, p.8962, 1.40 to p.8963, 1.18; Ex.774, Tab 22, p.4-214). This area is also referred to as Number 29 on Ex.725 and Ex.725A as Dawamuwx but in Ex.605 as Gwinin Nitxw (Ex.605, para. 42, p.13, Other Features, Item 8). On April 7, 1979, Morrell also recorded information from David Blackwater that a lake called Da'm Dakai about two miles upstream northeast of Damsilgwit in the Slamgeesh River system was in the territory of Dawamuxw (Tr.142, p.8963, 1.1-3; Ex.774, Tab 22, p.4-217). This feature is also referred to as Number 32 in Ex.725 and 725A but in Ex.605 as being in Gwinin Nitxw (Ex.605, para. 42, p.12, Lakes, Item 3). On April 1, 1979, Morrell noted information from David Blackwater and Bobby Stephens that a creek called Xsugwasak which entered Slamgeesh River about one mile below the lake is in Dawamuxw territory (Tr.142, p.8963, ll.12-18; Ex.774, Tab 22, p.4-218). This feature is referred to as Number 33 on Ex.725 and 725A and in Ex.605 (Ex.605, para. 42, p.13, Rivers and Creeks, Item 3). Other Sterritt notes identifying the Slamgeesh territory as owned by Dawamuxw are the two pages recorded following Sterritt's interview with Blackwater on May 22, 1983. These notes identify Dawamuxw's boundary at Slamgeesh and Babiche Hill (Skanism am nax) in Dawamuxw's territory (Tr.142, p.8963, ll.30-33; Ex.774, Tab 22, p.4-220 and 4-221). The latter feature is Number 77 on Ex.725 and 725A and is also in Ex.605 (Ex.605, para. 42, p.13, Mountains, Item 6). On April 2, 1979 Morrell recorded further information from David Blackwater. Slamgeesh Lake and River, known as G'alaanhlgiist, are in Dawamuxw territory. Morrell records that a cabin was built here by Moses Stephens before 1914. That cabin burned down and the present one was built by Charles Stephens. David Blackwater lived here with Moses Stephens and his wife until they moved to Kispiox about 1943 (Tr.142, p.8963, ll.34-40; Ex.774, Tab 22, p.4-226). These features are items 26 and 84 on Ex.725 and 725A and in Ex.605F (Ex.605F, para. 42, p.12, Lakes, Item 1; p.13, Rivers and Creeks, Item 2). On November 18, 1982 Sterritt noted information received from Solomon Jack that the Slamgeesh River formed the boundary between Gwinin Nitxw territory on the east and Dawamuxw territory on the west (Tr.142, p.8965, 1.39 to p.8966, 1.2; Ex.774, Tab 22, p.3-77). In the upper right-hand corner of the data sheet is a sketch map showing Moses Stephens to the west of what appears to be lower Slamgeesh River and Gwinin Nitxw to the east (Ex.774, Tab 22, p.3-77).

Walter Blackwater Cross-examination. On his cross-examination, Blackwater agreed that a creek, Xsu Wil Skaiyip flows down to Dam Silgwit, to Slamgeesh and to the Skeena (Ex.605A, p.28, ll.20-35). Dam Xsilgwit and Xsu Wil Skaiyip are two geographical features said to be within the Slamgeesh territory claimed by Gwinin Nitxw in Blackwater's 1988 affidavit (Ex.605, para. 42). Blackwater testified that Moses Stephens lived at Slamgeesh Lake with Blackwater's grandmother (Ex.605A, p.20, ll.1-17). Moses Stephens, whose chief's name was Dawamuxw, was Blackwater's grandfather (Ex.605A, p.20, ll.19-22). Blackwater said that Dawamuxw did not own the territory at Slamgeesh; it was owned by Gwinin Nitxw (Ex.605A, p.20, ll.23-45). Gwinin Nitxw is Kisegegas Wolf Clan and Dawamuxw is Fireweed Clan (Ex.650A, p.21, ll.2-7). Blackwater explained that his grandmother Esther Stephens and Gwinin Nitxw were just like sisters. Gwinin Nitxw permitted Esther and her husband to be caretakers of the territory as long as they wanted to be. Esther stayed there as long as she could and when she passed on, the territory was given back to Gwinin Nitxw (Ex.605A, p.21, ll.8-22). Moses and Esther Stephens' son was Charles Stephens whose chief's name was Gaiyemlaxhaa. Blackwater stated that Stephens did not claim ownership of the Slamgeesh territory (Ex.650A, p.21, ll.23-43). The map attached to Robert Stephens' interrogatories affidavit sworn August 7, 1986 showing the Wii Minosik territory at Blackwater Lake identifies the Slamgeesh area as being claimed by Dawamuxw (Ex.605-2). Blackwater did not agree that Dawamuxw claims the Slamgeesh area (Ex.605A, p.35, ll.23-27). The Wii Minosik (Robert Stevens) interrogatories map shows the boundary between the Blackwater/Damdochax Lake territory (Wii Minosik) and the Slamgeesh territory (Dawamuxw) running along the height of land (Ex.605-2). Exhibits 102 and 5 show this boundary in this location. Blackwater also agreed on his cross-examination that "on one side of the boundary all the creeks go to the Nass and the other side of the boundary all the creeks go to the Skeena." Ex.605A, p.31, ll.4-7 It is submitted that the

Blackwater Lake/Slamgeesh boundary description in Blackwater's 1988 affidavit (Ex.605, para. 40) and the boundary on map 9A do not follow the height of land and are inconsistent with Ex.650-2, Ex.102 and Ex.5 and with Blackwater's evidence on cross-examination. Marvin George referred to a "drafting error" in this area (Tr.217, p.15773, ll.18-43). That does not explain the difference between Blackwater's metes and boundary description and previous versions. In his answer to interrogatory 59(c) attached to his affidavit sworn August 21, 1986, Solomon Jack stated: "See map which is attached as Schedule "B". It sets out the approximate boundary of my territory." (Ex.420; Ex.605A, p.41, ll.40-47). The map produced with Jack's interrogatories identifies the Slamgeesh territory as claimed by Dawamuxw. Blackwater did not agree with that attribution (Ex.420; Ex.605A, p.41, ll.35-39). In his cross-examination, Blackwater did not recall the mountain known as Maxhla Lax Uut, referred to as being in the Slamgeesh territory on p.13, No. 7 under Mountains in his 1988 affidavit, Ex.605 (Ex.605A, p.43, ll.24-30).

Solomon Jack Cross-examination. Jack testified that he had trapped on only part of the Slamgeesh territory presently claimed by Gwinin Nitxw (Ex.597A, p.5, ll.22-30). That is part of the Slamgeesh area (along the Skeena) from approximately a mile above the Sustut River to the Slamgeesh River (Ex.597A, p.7, ll.1-15). Jack had only been on the southern part of the Slamgeesh territory (Ex.597A, p.5, ll.22-43). He went "from Xsi Naah T'aa'da down to Slamgeesh." (Ex.597A, p.5, ll.44-47; p.6, 26-34; p.7, ll.11-15). It is submitted that this description is consistent with the boundaries of the Slamgeesh territory on Ex.420 but not with the changed boundaries on map 9A. The map 9A boundaries for northern Gwinin Nitxw extend west of the Slamgeesh. According to Jack's evidence, he went only as far as the east bank of the Slamgeesh. It is submitted that the description of the area where Jack trapped appears to be the same as the area identified on the sketch which Sterritt drew on the left-hand margin of Ex.725 based upon information received from Walter Blackwater in 1982. That sketch shows Gwinin Nitxw territory east of the lower Slamgeesh River with Dawamuxw to the west (Ex.725). Jack stated in answer to interrogatory 59(e) attached to his affidavit sworn January 30, 1987 with respect to the Gwinin Nitxw territory as follows: "We lost part of our territory through my House allowing someone else to use it because the territory was so large. It was then registered under white man's law. The white man's registration caused a lot of problems because the territory is not supposed to go to the father's son, it's supposed to stay with the clan." Ex.597A, p.27, ll.35-41 Jack was referring to the Slamgeesh Lake area in this passage (Ex.597A, p.28, ll.25-32). Jack heard that Moses Stephens registered the territory. Gwinin Nitxw lost the territory through the White man's law (Ex.597A, p.28, 1.45 to p.29, 1.5). Jack said that Moses Stephens' father came from the Gwinin Nitxw House and he wanted to trap on the Gwinin Nitxw trapline. They told him to use Slamgeesh Lake. The area was so big that Gwinin Nitxw couldn't use it all the time. Moses Stephens then registered his trapline in that area. Accordingly, Jack thought that under the White law, Gwinin Nitxw had lost the territory (Ex.597A, p.29, ll.15-32). Jack's territorial affidavit, Ex.597, does not refer to the Slamgeesh territory. It also does not refer to the Slamgeesh territory as a Gwinin Nitxw territory bordering the area described in the affidavit, Ex.597.

Jack's interrogatories map, Ex.420, shows the Gwinin Nitxw territory as extending north of the Skeena River covering only the southwestern corner of the present Slamgeesh territory. The boundary as shown on Ex.420, in this area, follows the lower part of the Slamgeesh River north and then cuts northeast as the Slamgeesh River turns west (Ex.420). The rest of the Slamgeesh territory is attributed to Dawamuxw (Ex.420). Several of the geographical features noted on Ex.725 and 725A are identified as being in the Dawamuxw territory on the interrogatories map, Ex.420. Conclusions. Blackwater's territorial affidavit evidence as to the ownership of the Slamgeesh territory and as to the location of the boundaries of the territory are contradicted by his earlier statements to Neil Sterritt in 1982 and 1983 as well as by information provided by David Blackwater (Niist) and Robert Stephens (Wii Minosik) to Mike Morrell in April 1979. The Blackwater information is contradicted also by Solomon Jack's (Gwinin Nitxw) affidavit in 1986 to which were attached answers and interrogatories stating that Gwinin Nitxw had lost part of the Slamgeesh territory. The answers referred to an attached map of Gwinin Nitxw territory showing part of the Slamgeesh area owned by Gwinin Nitxw and the remainder owned by Dawamuxw. Jack's interview with Sterritt on November 18, 1982 also conflicts with the Blackwater evidence as does Albert Tait's

(Delgamuukw) information on July 4, 1983. All the maps referred to above conflict with Blackwater's affidavit and the map 9A boundary evidence. David Blackwater (Niist) and Albert Tait (Delgamuukw) are chiefs very high in the Gitksan hierarchy. Their conflicting evidence, it is submitted, corroborates the conclusion that little, if any, credence can be given to the Blackwater affidavit evidence. It is submitted that David Blackwater's conflicting evidence is particularly damaging. Blackwater lived with Moses Stephens and his wife at Slamgeesh. It is unlikely that there was any doubt in Stephens' or Blackwater's mind who claimed Slamgeesh. The explanations for the change in attribution from Dawamuxw to Gaiyamlaxhaa to Gwinin Nitxw are conflicting and confusing. There appears to have been no discussion about this with current Dawamuxw members. Various witnesses and informants attribute Moses Stephens' presence at Slamgeesh to Yugwilaat; a peace settlement; friendship between Esther Stephens and Gwinin Nitxw; Moses Stephens' father's membership in Gwinin Nitxw. The process by which the affidavit was prepared is unreliable because Sterritt drafted the affidavit based on information he received from other sources and brought it to Blackwater for review. It is submitted that Sterritt's interview techniques are illustrated by the 1983 interview in which he suggested boundary locations to Blackwater and referred to other informants. The only informants referred to in the affidavit are deceased informants whereas there may be other living informants who provided this information to Sterritt and Blackwater. It is submitted that Sterritt's topographic maps and data sheets disclose that the boundary and other geographical information contained in the Blackwater 1988 affidavit probably came from living informants other than Walter Blackwater. The affidavit information therefore does not comply with the reputation evidence criteria, is inadmissible and in any event is unreliable. Several high chiefs believed in 1979, 1982, 1983 and 1986 that Dawamuxw owned the Slamgeesh area. By 1982 all informants to which Blackwater refers in his 1988 affidavit were deceased. They could provide no further new information to him. Nevertheless, Blackwater changed his views as to the ownership of the Slamgeesh territory about 1988. Sterritt testified that Blackwater had participated in a field trip to the Slamgeesh area with Sterritt, David Blackwater and Nancy Supernault in 1986, but he did not advise Sterritt of the change in ownership until 1988. Sterritt also testified that many of the chiefs discussed their territories with other living persons although he could not say whether Walter Blackwater had done this or to whom he might have spoken. It is submitted, therefore that the Slamgeesh area information in the Blackwater territorial affidavit, as well as the remainder of the affidavit, is inadmissible and if admissible, unreliable. There is no evidence upon which the Slamgeesh area ownership and boundaries as shown on map 9A can be based. As with other territories, once the Slamgeesh territory information becomes unreliable, it destroys the evidence as to territorial boundaries of neighbouring territories. The entire process by which the Blackwater affidavit was prepared renders unreliable all the evidence in the affidavit relating to the territories, thereby eliminating a large part of the evidence for the territorial boundaries in the northwest part of the Claim Area.

**(c) Canada's Written Summary.**

This territory lies approximately 30 miles northeast of Kuldo in the north central part of the Gitksan claim area. Major features of the area include the Slamgeesh and Skeena Rivers and Shilahou and Kitlangas Creeks. The territory is described in the affidavit of Walter Blackwater (Exhibit 605, Section F). The Plaintiffs' submissions on this area are found at pages 173 to 178-8 of Volume VI of their final argument.

### CONCLUSION 2.

There is evidence before the Court that this territory was used for hunting and/or trapping at some point prior to 1956. There is insufficient evidence to establish when the territory was in fact last used for those purposes, but there is evidence of whites using the area in the late 1930's and after 1978. These non-Indian users did not encounter Indians using this territory. Therefore, the Plaintiffs have not established that this territory has been continuously used for hunting and trapping. It is probable in fact that this territory has been abandoned for at least 30 or 40 years.

**EVIDENCE 3.**

Solomon Jack, who gave evidence concerning the adjacent Gwinin Nitxw territory to the south, testified that he had been on part of the Slamgeesh River territory, although he had never "trapped on the whole works." (Exhibit 597A, p. 5). Mr. Jack testified that he had been from Xsi Na'ahl T'aa down to the Slamgeesh River and that he used to trap some beaver there (Exhibit 597A, pp. 5 and 25-6). He further described this area as "from a mile above the Sustut River to the Slamgeesh" but also on the telegraph line and the old mountie trail (Exhibit 597A, p. 7). Mr. Jack appears to have last trapped in this northern area approximately 1940 (Exhibit 597A, p. 36).

**4.** Walter Blackwater testified that when he was living at Damdochax Lake, Moses Stevens was living at Slamgeesh Lake (Galaanhl Giist) with Walter Blackwater's grandmother (Exhibit 605A, p. 20). Walter Blackwater last lived at Damdochax Lake in 1956 (Exhibit 605A, p. 19). Victor Giraud also provided some evidence concerning Moses Stevens.

**5.** Victor Giraud, a former trapper and federal fisheries officer, testified that he and Lou Gelley bought a trapline from Jim Hodder located on Yukon telegraph line from third to sixth cabin (Exhibit 1214A, p. 4 and Exhibit 1214C, p. 72). Fifth cabin is located near Slamgeesh Lake (Exhibit 1214-40; Sterritt testimony, v. 120, p. 7488; Steciw testimony, v. 250, p. 18484). Gelley and Giraud trapped the line for two years in the late 1930's (Exhibit 1214A, p. 4). Lou Gelley trapped the northern part of the line from fourth to fifth cabin while Giraud trapped generally below that (Exhibit 1214A, p. 6, 1214D, p. 130).

**6.** Mr. Giraud stated that they frequently encountered Moses Stevens who was living in a cabin near second cabin on the Yukon telegraph line, south of where they were trapping (Exhibit 1214A, pp. 6-7). Mr. Giraud described Moses Stevens as an "old gentleman" (Exhibit 1214D, pp. 127-9). The genealogy of Dawamuxw states that Moses Stevens was born in 1861 and died in 1971 (Exhibit 853(4), p. 1). Given this information, it is unlikely that Mr. Stevens was living or trapping in the Slamgeesh Lake area after the mid to late 1930's.

**7.** Walter Blackwater testified that the Department of Indian Affairs bought the registered trapline which covers part of this territory for him in 1951 (Exhibit 605A, p. 46). The description of this trapline includes the western half of the Slamgeesh River territory of Gwinin Nitxw (see Exhibit 605A-3). Mr. Blackwater testified with respect to this trapline that "I don't hardly go over there" (Exhibit 605A, p. 46).

**8.** Igor Steciw testified that he made a number of trips into the Slamgeesh Lake area in 1978 and after. He testified that he went to the Slamgeesh Lake area to clean up a guide outfitter's cabin that he had purchased and freshen up the local trails for the purpose of guiding hunters (v. 250, p. 18482; v. 251, p. 18579-80). He testified that the Yukon telegraph trail was virtually unrecognizable. It was an "alder thicket" (v. 251, p. 18536).

**9.** When Mr. Steciw was in the area in 1978, 1979, 1984 and 1985, he saw no sign of other current human activity (v. 250, pp. 18483-4, 18486, and 18490-2). When Mr. Steciw was in the area he found the ruins of two old cabins at Dam Shilgwit Lake and old blazes on trees (v. 250, pp. 18484-5). It is clear from Mr. Steciw's evidence that the Slamgeesh River area has not been used for trapping, at least from the late 1970's and probably from much earlier.

### Part 2. Gyolgyet (Mary McKenzie).

#### (a) Plaintiff's Written Summary.

Gyologyet's territory is a big area and each of the Chiefs of her House share a portion of the territory. The Chiefs of her House are Madeek, Hla'oxs, Kwamoon and Gadilo'o (V. 4, p. 276).

Mrs. Mary McKenzie, the present holder of the name of Gyologyet, testified that Kwamoon's territory was described in a feast in 1942 (V.5, p.324). Gyologyet's territory was described in feasts and most recently was described at the funeral feast of Marion Jack in 1959 (V. 7, p. 417 and V. 8, p.440). There has never been a feast where any Chief has ever raised a question as to whether Gyologyet's territory or any part of it does not belong to Gyologyet (V. 8, p. 440).

Mary McKenzie received the name of Gyologyet in 1959 at a pole-raising feast. Before that she held the Chief name of Kwamoon, which had been formerly held by Peter Robinson, who died in 1935 (V. 3, p. 163). Gyologyet was originally from Gitangasx and more recently from the village of Kuldo (V. 3, p. 184). When at Kuldo each of the Chiefs original had their own House (V. 3, p. 193). Ggologyet's totem pole is still at Kuldo because that is where the strength of the House is (V. 7, p. 406).

The location of Gyologyet's territory is described at V.3, p. 186 and 194 - 195.

The House of Gyologyet protected and maintained the boundaries of the territory:

> Because there are witnesses there, the Head Chief is there to witness it and another thing too, where our territory is, there are other territories that he has to go through to get to our territory. So this has to be explained in the feasting that the people up there, my neighbours, our neighbours around our territory if they see him they know where his destination is, where he is going to go and trap.
>
> (V.5, p. 322).

In 1978 Albert Tait talked to Mrs. McKenzie specifically about the mountains, creeks and rivers on Gyologyet's territory (V. 10, pp. 651 - 562). In 1983 Albert Tait told Mrs. McKenzie that he wanted to leave her with everything he knew and understood of his territory from his father Luus (V. 10, p. 598).

Mrs. McKenzie described the importance of the adaawk as it relates to her knowledge of her territory:

> Because the adaawk tells, in a feast hall, that who are the holders of fishing places, creeks and mountains that belong to each House of the Chiefs, where they get food, like berry picking, they have — they tell the owner and the location and the feast House, so, through this, this is how I have my knowledge now is by attending the feasting of any Chief, even if it is my own feasting, I hear the Chiefs repeat or tell of the adaawk of theirs and ours. This is the importance of the feasting, that these adaawk's are told
>
> (V. 3 p. 190).

Gyologyet's territory is located three miles from old Kuldo (V. 4, p. 232). Mrs. McKenzie consults with the other Chiefs of her House with regard to others using Gyologyet's territory (V. 6, p. 372).

Mrs. McKenzie has never been out on the territory of Gyologyet, but her husband has been there and she is familiar with the names. She spent her time on her husband's territory (V. 7, p. 426). It is a common occurrence for wives to spend time on the hunting and trapping grounds of their husbands.

Mrs. McKenzie's husband has trapped on the territory and so has another member of the House, Marianne Jack (V. 8, p. 445). Marianne trapped on this territory until 1958, the year before she died (V. 8, p. 443).

Mrs. McKenzie has maintained contact or been kept informed about what's happening on the territory in the last 20 years. The neighbours protect the territory. If they see a trespasser they report it. Neighbours like Delgamuukw and Djogaslee have gone through her territory to get to their own (V. 8, p. 447).

Marianne Jack was allowed to go through the territory because she knew it and she blazed trails for traplines. Mary McKenzie's son, Bennie, and her grandson, Johnny, have decided to go out on the territory (V. 8, p. 450).

Mary McKenzie knows the adaawk of the territory and told the adaawk of her House. One of the reasons the adaawk of the territory is told is to protect the territory and when the Gitksan Chiefs tell the adaawk of their territory they are really saying that this is Gitksan land and not white man's land and the other Chiefs sitting there agree. This has been the case for as long as Mary McKenzie has been going to feasts. She has told her adaawk at feasts and the head Chief of the House is the proper person to tell the adaawk. The boundaries of the territory have not changed despite the introduction of the trapline registration system (V. 9, p. 536).

Mrs. McKenzie identified Exhibit 7 as a map of the Gyologyet territory.

Richard Benson was given permission by Mrs. McKenzie to describe and speak in respect of the Gyologyet territories. Mr. Benson was a Gitksan Chief who held the name of Gla Ee'yiw. He was a member of the House of Luus, Lax Gibuu (Wolf) Clan from the village of Kuldo. Mr. Benson described the Gyologyet territory in a territorial affidavit marked as Exhibit 661-2 in his commission evidence. The Gyologyet territory is divided into three parts and each part was described separately in the affidavit.

Mr. Benson was born in 1909 and at the time of his giving evidence he was 78 years old. His mother's name was An Hlo'o in the House of Luus. Her brother was Abel Tait, Luus, (X. 661, p. 3). Mr. Benson's mother was raised by Marianne Jack. Mr. Benson lived at Meziadan Lake until 1935 when he got married at which time he moved to Glen Vowell and went out trapping with his aunt Marianne Jack (p. 8).

In 1935 Mr. Benson trapped with Marianne Jack on the territories of Gyologyet. At that time he also travelled with her husband, Tommy Jack, as well as Jasper Jack and David Jack. They travelled to the territory by dog team and toboggan along the ice on the river. Mr. Benson described the route that they follow to their camping point on Gyologyet's territory at Win Skahl Guuhl, which is a canyon on the Nass River (X. 661, p.21).

### i. Xsagan Gaxda (Kuldo Creek) Territory

This territory is located three miles from the village of Kuldo and is the most southerly area of the territory of the House of Gyologyet. Mr. Benson was instructed about this territory by Abel Tait, the former Luus, by Philip Brown, a member of the House of Gutginuxw. Philip Brown pointed out the boundary points and major landmarks to Mr. Benson when they travelled in the territory.

Mr. Benson identified and named in Gitksan eight **land features** including Andap Matx, Gologet Mountain and Ansa Gan Djap, which is Kuldo Mountain. He testified that to the west of this territory is the territory of Angulilbix.

In cross-examination Mr. Benson corrected his affidavit to say that the territory of Gyologyet is on both sides of Xsagan Gaksda and that the boundary is on the mountains on the left side (p. 148). Mr. Benson learned about the territory at Kuldo Creek from Mathias Wesley and not from Philip Brown, however, Philip Brown told him that the territory belonged to Gyologyet (p.150).

The Provincial Defendants focus on the southern territory of Gyolugyet and the apparent discrepancy in the evidence between Mary McKenzie and Richard Benson.

Mary McKenzie described her territory with reference to certain geographic place names. The first creek that she referred to was Kuldo Creek or Xsagan Gaksda.

M. McKenzie, V. 7, p. 414

She went on to explain that all of these creeks, including Kuldo Creek, are inside her territory.

Mrs. McKenzie explained that the territory goes with the Adaawk. She did not describe the Adaawk in detail in her evidence. However, the Court subsequently heard the detail of the Adaawk and it's connection to the territory in the evidence of Art Mathews, Jr. Mrs. McKenzie confirmed that when her grandmother taught her the Adaawk, she described the territory by the creeks and the mountains. These were the same creek and mountains described by Mrs. McKenzie in her own evidence. (M. McKenzie, V. 9, pp. 531-532).

Mrs. McKenzie went on the explain that this very large territory was actually divided up between three sub-Chiefs within the House. Hlo'ox utilized and managed the territory around Kuldo Creek. Madeek utilized the territory around Xsa'an Lo'op. Kwamoon utilized the territory around Sankisoots. Therefore, although this territory is very large, it was sub-divided between the three Chiefs. This is reflected in Exhibit 646-9A.

M. McKenzie, V. 7, p. 416

The Provincial Defendants in there Argument make a major issue of the boundary at Kuldo Creek. The affidavit of Mr. Benson appears to be different from his evidence. Mr. George did not rely on the affidavit but relied on the evidence to map Exhibit 646-9A. Mr. Sterritt explained his misunderstanding with respect to the mapping of the boundary at Kuldo Creek:

> "Q . . . Now, Mr. Sterritt, if you'll look to the southern portion of the territory, and I would ask you if you see any adjustment in the boundary referred — in the southern portion as a result of information that came to you after that map was prepared?
>
> A. Yes. Here is where I was having — personally was having a great deal of difficulty in getting this straight, partly because of the name of the creek, Xsagan Gaksea . . . Which is Kuldoe Creek. It was — as you go up that creek and swing around to the left, that's what's known on the map as Kuldoe Creek, and it's what I talked about this morning in relation to Mary Johnson's, the map of Antgulibix and Tsibasaa, Dam Ansa Angwas . . . Richard Benson had clarified that there was a name change at the junction downstream from that river — or from that creek when it entered Xsagan Gaksea . . . In any event, I was having trouble determining where the boundary of Gyolugyet went in this area, and subsequently, during the commission of Richard Benson, he identified that the boundary continued along the height of land south of Kuldoe Creek, down to the junction of Kuldoe Creek and what is locally known as Little Kuldoe Creek or Gwiis Xsagan Gaksea . . . And that's under the name Mauus . . . on the map.
>
> Q. That is on the map that's in front of you?
>
> A. Yes. So there is a change to go approximately through the name Mauus and on down to the junction of Little Kuldoe Creek and Big Kuldoe Creek.
>
> Q. And did that change conform to the evidence of Richard Benson?
>
> A. Yes, it did.
>
> Q. All right.
>
> A. And the other change is that the line should go through the lake at the head of Kuldoe Creek, which I described this morning.
>
> Q. All right. Apart from the evidence of Richard Benson on commission, was there any other information about that change which you had received from another source?
>
> A. Yes. From Pete Muldoe and from Jeff Harris Senior, and those notes are in the spring of 1988.
>
> Q. Now, if you'll just step off the witness stand for a moment and look at overlay map 9-A, please. Look at the black line. Does the black line on 9-A reflect the changes about which you were informed?
>
> A. Yes. The area that we are talking about is very close to New Kuldoe, and this black line of 9-A corresponds to the changes that I'm talking about, as well as the change in Gyolugyet's territory to exclude Xsu Wii Luu Dagwigit. . . . at the head of Taylor River."
>
> N. J. Sterritt, V. 126, pp. 7773-7774

Mr. Sterritt clearly delineated the distinctions in the mapping process. The evidence of Mr. Benson and Mrs. McKenzie is not inconsistent on this point. Mrs. McKenzie indicated that

Kuldoe Creek was one of the principal creeks within her territory. Mr. Benson clarified in his evidence on cross-examination that the boundary followed the height of land to the west of Kuldoe Creek. This is the evidence which was relied upon by Mr. George in depicting the territory on Exhibit 646-9A. It is important at this point to note that Mrs. McKenzie gave her evidence in May 1987. Mr. Benson, now deceased, gave his evidence in November and December 1987. Mr. Sterritt gave his evidence on this point on September 14, 1988.

The Defendants did not cross-examine Mr. Jeff Harris Sr. who testified as to the territory at Mauus at Kuldoe Creek on this boundary. Mr. Harris' affidavit is consistent with the evidence of Mrs. McKenzie, Mr. Benson and Mr. Sterritt. In fact, the Provincial Defendant raised nothing in cross-examination with respect to the Kuldoe Creek territory of Mauus.

J. Harris, V. 158, pp. 10085-10086

It is significant that Mr. Sterritt obtained information on this boundary from Jeff Harris Sr. This was known to the Defendants when they cross-examined Mr. Harris.

N. J. Sterritt, V. 126, p. 7774

Mrs. McKenzie identified the territory of Gyologyet as mapped on Exhibit 5 in the proceedings.

After 1944, Mr. Benson trapped with Abel Tait, Luus, on this territory. They were given permission by Gyologyet to trap there. Mr. Benson was told the names of this territory by Marianne Jack (X.661, p. 36). He was also told by Peter Robinson, who held the name of Kwamoon. Mr. Benson trapped for several years on this territory. First in the late fall and then in the spring. While on the territory they stayed at a cabin in a "great big open place" called Luu La$\underline{x}$ Mihlit (p. 37). He was also there with Steve Morrison, Charlie Hillis, Pete Muldoe and Jeff Harris (p. 38). On occasion he stayed at his uncle's House in Kuldo and then went over trapping in the Gyologyet territory. The last time that Mr. Benson trapped on this territory was in 1951. He also hunted on this territory. He hunted for moose and goat (p. 49-50). There were trails on the territory which had been built by Gyologyet's relatives and when they went through they cleared away the wind falls. They kept the trails up by blazing them as well (p. 51).

### ii. Xsana Lo'op (Shanalope Creek) Territory

This is the second territory owned by Gyologyet and it is located northwest of Gologet Mountain, 30 miles northwest of the village of Kuldo. Mr. Benson, who testified to this territory in Exhibit 2 was instructed about the territory by the former Kwamoon of the House of Gyologyet, Mary Ann Jack.

Mary Ann pointed out the boundary locations and landmarks when they travelled in the territory and said that this belonged to Gyologyet and Kwamoon. The territory of Delgamuukw is located to the south and west of this territory. In his affidavit, Mr. Benson gave the Gitksan meaning to the Gitksan boundary locations which he identified.

Mr. Benson testified that Xsa'an Lo'op is Gyologyet's territory (X. 661, p. 185). He named the main mountain on the western side of the territory being Kologet Mountain.

### iii. Xsihl Guugan (Taylor River) Territory

This territory belonging to Gyologyet is located 45 miles northwest of the village of Kuldo on the north side of the Nass River. Mr. Benson, who testified to this territory in his affidavit as well, was told about the territory by Mary Ann Jack, the former Kwamoon. She pointed out the boundary points and landmarks on the territory. Mr. Benson pointed out the creek called in Gitksan, Xsan Yam, which on the maps is Sanyan Creek. He also identified a canyon on the Nass River near Mike Creek called Win Skahl Guuhl. To the north of the Gyologyet territory Mr. Benson identified the House of Niist as being the owner of that territory. Skiik'm Lax Haa and Djogaslee own the territories to the west.

Neil Sterritt, in cross examination explained the difference between the draft interrogatory map and the boundary as depicted on Exhibit 646-9A. With reference to the interrogatory map he stated as follows:

> "Q . . . Now, Mr. Sterritt, I just want you to look at this map and ask you if you received subsequent information from a hereditary chief or hereditary chiefs, which led you to conclude there was a change in the boundary as it's described in this map?
>
> A. Yes. I had always been told that the creek, Xsihl Guugan . . . which appears on topographic maps as Taylor River, that that belonged to Gyolugyet. And the extrapolation that I made was that the territory of Gyolugyet went to the very headwaters of the Taylor River.
>
> Q. And that's what is shown here on this exhibit?
>
> A. Yes.
>
> Q. Did subsequent information you received alter that boundary?
>
> A. Yes, it did. I had been told about a creek named Xsu Wii Luu Dagwigit . . . . A creek named Xsu Wii Luu Dagwigit was somewhere in the north end of this territory, and David Gunanoot actually first described that creek to me as a trail route that he had taken from the Bell-Irving River over to the Upper Nass River. And in — I eventually located where that was, and in doing that, I also had discussions, subsequently, that explained that Xsu Wii Luu Dagwigit was the territory of the House of Niist.
>
> Q. And from whom did you obtain those instructions?
>
> A. Walter Blackwater.
>
> Q. Niist is the hereditary chief who has territory north of Gyolugyet?
>
> A. And east.
>
> Q. All right.
>
> A. Yes. Also, Richard Benson and I talked to Daisy Olsen, she was the daughter of Alfred Shanoss . . . . and she mentioned that — that creek. And Abel Brown, I believe, mentioned that creek as being — he had mentioned it, I think he mentioned that it was part of that — of the territory of Peter Shanoss, but I'm not sure if he said that, but certainly the others did.
>
> Q. And Peter Shanoss was in the House of Niist?
>
> A. Yes.
>
> Q. Now, in — was there a change in the boundary in the northern portion of Gyolugyet's territory that borders with Niist?
>
> A. Yes. The boundary followed the height of land south of Xsu Wii Luu Dagwigit until it crossed where — just below where Xsu Wii Luu Dagwigit entered the main Taylor River.
>
> Q. All right. And can you tell us at about what time it was that you received the information that led to that change?
>
> A. In 1987.
>
> N. J. Sterritt, V. 126, pp. 7771-7772

This change from the interrogatory map is reflected in Exhibit 646-9A. It is apparent from the description given by Mr. Sterritt that the reason for the discrepancy between the interrogatory map and Exhibit 646-9A at this point is as a result of a misunderstanding by Mr. Sterritt in which he extrapolated with respect to the Taylor River belonging to Gyolugyet. This mistake was rectified and is reflected in the final map.

Richard Benson testified that he hunted and trapped throughout all of the three Gyologyet territories during the 30's and 40's and he travelled on the territory with Mary Ann Jack and this is how he learned about the territory.

In 1935 Mr. Benson trapped with Marianne Jack in the northern territory at Xsihl Guugan (Taylor River). At this time he was shown the trail and told where to find the traps and to go trapping. Marianne Jack told him where to trap and he trapped up the Taylor river on the north side of the Nass (X. 661, p. 23). He trapped up the right side of the river and Marianne trapped up the left side going north. On this occasion Marianne told Mr. Benson about the names of the places and the boundary of the territory. She also told him the stories of the territory (p. 25). On that occasion they hunted for moose for food and they saw no non-Indian people. (p. 26).

Mr. Benson testified that in 1935 he walked about four days up the right side of Taylor River with Jasper Jack, camping along the way. And they went a further day north to look around and then they returned to pick up the furs on the way back. (X. 661, p. 110-111). They met Marianne Jack and her husband, Tommy, back at the canyon camp. Mr. Benson's estimate of the distance he travelled was about thirty-five miles. He testified that Marianne told her that this territory belonged to Gyologyet and "she told all the stories in all the trail." (p. 112). She also said that Gyologyet had so much territory there because he had so many relatives (p. 112).

Mr. Benson was cross-examined about his knowledge of who owned the territory on the north side of Xsihl Guugan today and he replied it was Charlie Sampson:

> That's Niist territory . . . Marianne and Charlie Sampson himself, Niist himself, (told him). That's when Niist told me that that's when I was trapping with Marianne at T'am Nihl Janda. You see, we camped together there. That's when he started telling me
>
> (X. 661, p. 115).

Mr. Benson went on to identify the lake known as T'am Saabaaya as belonging to Alfred Saanoos, who is also in the House of Niist. He heard this from his wife, who with her mother and Saanoos, spent a winter there on the Charlie Sampson (Niist) side (p.116).

When questioned further about the places in Gyologyet's territory, Mr. Benson replied:

> That's true, you know, because, you see, I travel all the way through these place. Nobody just — what I travel through, that's what I am telling. You see, I walk through, I trap through here. I walk all the way through and I know all these place and these mountains and you see, what they told me, that's what I really like to tell, you see, because I supposed to tell the truth. That's what you said when I began. Nothing but the truth. That's what — that's what I am doing . . . I am telling what I already been — I walk through and I see these creeks and I walk through there and I know where they are and I know who it belongs to. They tell me right beginning before I start even my uncle. Well, they had a story what spread out, you know, about Gyologyet and they start telling me, but I can't remember them all. But the only thing that I remember, that's when I go on it and trap through there and I really been many times on it. And just that the one I really know, that's what I am trying to tell the truth about it and nothing but the truth. That's true. That's what I am — I'm doing the best I could.

**(b) Province's Written Summary.**

The territory claimed by the House of Gyolugyet is one of the most extensive, a huge area reaching from just northwest of the Kuldo Indian Reserve to the head of the Taylor River north of the Nass River, including the watersheds of Kuldo Creek, Shanalope Creek and the Taylor River. Marvin George prepared map 9A based upon information from various sources (Tr.217, pp.15767-15769). He did not refer to McKenzie's trial testimony. He did refer however to the territorial affidavit of Richard Benson Ex.661E (Tr.217, pp.15768, 1.25 to p.15769, 1.12). The Benson affidavit, sworn November 16, 1987, refers to the boundaries for the three Gyolugyet territories, Kuldo Creek (Section A), Shanalope Creek (Section B), and the Taylor River (Section C). Benson testified on commission in Hazelton on November 24, 25, 26 and December 7, 1987. Mary McKenzie. McKenzie identified the Gyolugyet territorial boundaries on Ex.5 as being accurate

(Tr.7, p.410, 1.26 to p.411, 1.10). Counsel for the Plaintiffs also confirmed that Ex.5 showed the boundaries of the Plaintiffs' territories (Tr.7, p.410, ll.26-32). The boundaries on Ex.5 differ from those on Ex.646-9A, particularly in the Kuldo Creek area. McKenzie identified a large scale map of the territory, Ex.7, as being accurate (Tr.7, p.415, 1.30 to p.416, 1.1). Exhibit 7 bears the initials "MFG/NJS" in the lower right-hand corner. According to McKenzie, Sterritt drew the map (Tr.7, p.416, ll.42-47). The Ex.7 boundaries are the same as Ex.5. McKenzie stated that she was very familiar with certain geographic features in the claim area especially after her husband had made two trips there (Tr.7, p.414, ll.13-18). Her husband had drawn a map for her (Tr.7, p.426, ll.18-20). She referred to seven creeks and some other geographic features on the territory (Tr.7, p.414, 1.21 to p.415, 1.24).

McKenzie said that she had learned the names of the places on the territory from her grandmother and her mother. The names had also been described in the feasts (Tr.7, p.426, ll.2-9). McKenzie had never been to the Gyolugyet claim area (Tr.7, p.426, ll.16-18; Tr.9, p.549, ll.6-8). Because the "feeling" of the people in Court was not like that of the Gitksan, McKenzie could not give any further details from the adaawk about the claim area (Tr.9, p.531, 1.23 to p.532, 1.2). McKenzie swore an affidavit on January 23, 1987 exhibiting answers to Interrogatories. At that time, she knew where the boundaries of her territory were but she said that she had learned more about the boundaries since January 1987 (Tr.9, p.538, 11.12-35). She learned there was an overlap in a couple of places, one being on Djogaslee and the other being one of the Blackwaters (Tr.9, p.538, 1. 38 to p.539, 1.6). McKenzie's Interrogatories map (Ex.661I) was noted as showing the "approximate boundaries of her territory" (Tr.9, p.537, ll.20-29). The Ex.661I boundaries differ from Ex.5, Ex.7 and Ex.646-9A, particularly in the Kuldo Creek and Upper Taylor River areas.

Counsel for the Province referred to the creeks and other geographical features which McKenzie had mentioned. McKenzie said that those were all the place names that her grandmother had told her (Tr.9, p.539, 1.9 to p.540, 1.38). McKenzie said that the creeks are all in the adaawk. The chief's territories are described by reference to the creek. When the names of the creeks are called out, "we exactly know who-what chief's territory is in that whole territory" (Tr.9, p.540, 1.39 to p.541, 1.20). The Nass River does not belong to Gyolugyet although the House's alleged territory extends north and south of the river (Tr.9, p.541, 1.39 to p.542, 1.7). McKenzie agreed that Chris Harris would have been knowledgeable about the House of Gyolugyet and the territory because he was in Luus' House and he was Chief Luus at that time (Tr.9, p.547, ll.21-30). The Gyolugyet boundaries on Ex.661I, Ex.5, Ex.7 and Ex.646-9A all differ from the Gyolugyet boundaries on the Chris Harris map, Ex.22.

McKenzie stated that she went to Albert Tait to obtain information about the Gyolugyet adaawk and the territory (Tr.9, p.521, ll.3-28). Tait was not in the House of Gyolugyet; he was from another clan (Tr.9, p.522,11.18-21). McKenzie wrote notes of conversations with Albert Tait in her diary (Ex.11). An entry dated May 1978 read "Albert Tait came to my House, he wanted me to know the mountains, creeks and rivers on Gyolugyet's land" (Tr.10, p.561, ll.36-44). In another entry dated November 1983, she wrote that Albert Tait came to her House again. He told her that he had been up to view the Gyolugyet territory with Neil Sterritt Jr. The head chiefs had asked Sterritt to prepare maps of these areas, including traplines. Tait said that he would help Sterritt make the maps. "He said he mentioned to me already before the names of chiefs and creeks on our territory" (Tr.10, p.562, ll.7-30). McKenzie was vague about the location of Win skahl guuhl where Wallace Danes had registered a trapline without her permission (Tr.9, p.549, ll.2-37). McKenzie also could not locate her registered trapline on Ex.7 (Tr.10, p.569, 1.26 to p.570, 1.10).

Richard Benson. The Kuldo Creek territory boundaries described in Benson's territorial affidavit (Ex.661E) differ from the boundaries in Ex.5 and Ex.7 identified as correct by McKenzie and in Ex.661I. The boundaries on Ex.646-9A also do not follow the description in the Benson's territorial affidavit. For example, the boundary of the Kuldo Creek territory as set out in paragraph 5 of the Benson affidavit differs from the boundary as shown in map 9A. In Benson's affidavit paragraph 5 the description reads "The boundary runs up Xsagan Gaxda (lower Kuldo Creek) and up Xsi Ansa Angwas (upper Kuldo Creek) to the lake called Dam ansa Angwas (un-named on government map)." Ex.661E, para. 5 The southern boundary of the Kuldo Creek territory on map 9A is significantly different from that boundary description.

Statements in paragraph 4 of the Benson affidavit are false. The affidavit says that Benson was instructed about the Kuldo Creek territory by Abel Tait and Philip Brown. Benson agreed that he did not learn about the territory from Abel Tait or Philip Brown and that paragraph 4 was wrong (Ex.661, p.147, ll.6-23). Paragraph 5 is also false. The boundary of the Kuldo Creek territory does not run up Kuldo Creek. According to Benson, it goes along the mountains along the left side of the creek. (Ex.661, p.147, 1.37 to p.148, 1.12). Benson further agreed that paragraph 8 of the affidavit is false since Philip Brown had never told Benson anything about the Kuldo Creek territory boundaries (Ex.661, p.149, 1.16 to p.150, 1.21). Benson did not recognize McKenzie's Interrogatories map (Ex.661I) but he said that Sterritt had shown him a map of the Gyolugyet territories. At that time Benson was placing the names of the creeks on the map (Ex.661, p.148, ll.26-43; p.201, 1.23 to p.203, 1.10).

Neil Sterritt. Sterritt stated that he obtained information about the Gyolugyet territory from Peter Muldoe, Richard Benson, Albert Tait, David Gunanoot, Walter Blackwater, Chris Harris and Steve Morrison. He extrapolated from this information to draw the upper Taylor River boundaries. He provided the information to Marvin George who drew Ex.661I, the McKenzie Interrogatories map (Tr.126, p.7771, ll.1-29). Sterritt said that he received further information which led to a change in his "extrapolated" boundaries in the upper Taylor River area. On Ex.661I the boundary went to the very headwaters of the Taylor River (Tr.126, p.7771, 1.34 to p.7772, 1.2). He changed this boundary in 1987 after receiving information from Walter Blackwater, Abel Brown, Richard Benson and Daisy Olsen between January and June 1987 (Tr.126, p.7772, 1.3 to p.7773, 1.12). This change is reflected on Ex.7, Ex.5 (Tr.126, p.7772, 1.47 to p.7773, 1.7) and Ex.646-9A (Tr.126, p.7774, ll.24-28). Sterritt further said that the Kuldo Creek territory boundary on Ex.5 (and Ex.7) had been subsequently changed to conform to Benson's evidence on his commission (Tr.126, p.7773, 1.19 to p.7774, 1.8). That change resulted in the Ex.646-9A boundary. Another change was that the line should go through the lake at the head of Kuldo Creek. Sterritt obtained information about that latter change from Peter Muldoe and Jeff Harris Sr. in the spring 1988 (Tr.126, p.7774, ll.10-18). Walter Wilson (Djogaslee) owns a trapline including the first big lake south of the Nass River and west of Xsan gehl Tsuuts (Sanskisoot Creek). He derived these rights from Daniel Skawill. Sterritt received this information from Albert Tait. These rights are not recorded in the Gyolugyet territory on map 9A (Tr.141, p.8933, 1.46 to p.8934, 1.36; Ex.774, Tab 11, p.22). Sterritt's Land Use Reference Data sheets show Kuldo Creek as the boundary between Gyolugyet and Mauus (Ex.724A, Item 202). That is inconsistent with Benson's testimony and Ex.646-9A. It is consistent with Benson's affidavit (Ex.661E), Ex.661I, Ex.7 and Ex.5. This appears to be the information which Sterritt used when drafting Benson's affidavit and which he gave to Marvin George to draw Ex.661I, Ex.5 and Ex.7.

Walter Wilson. Wilson signed a registered trapline application for a trapline that extends south across the Nass River into Gyolugyet territory (Ex.602A, p.21, ll.10-18). He said that his great uncle Daniel Skawill had a cabin at An Tsok on the east bank of the Kwinageese River near its confluence with the Nass River (Ex.602A, p.32, ll.25-46). That location is in the Gyolugyet claim area on Ex.646-9A. He also said that Gyolugyet did not own An Tsok since it was a common area (Ex.602A, p.72, ll.31-36).

### Conclusions

Ex.646-9A conflicts with the Kuldo Creek claim area boundary description in the Benson affidavit, Ex.661E. Exhibit 646-9A conflicts also with Ex.661I, McKenzie's Interrogatories map. It conflicts as well with Ex.5 and Ex.7 which were identified by McKenzie as showing the correct boundaries of her House's claim area. Sterritt obtained conflicting information from several hereditary chiefs, some of whom were living at the date of Benson's affidavit. That information conflicted with Benson's testimony as to the Kuldo Creek territory and the Taylor River territory boundaries. Sterritt relied upon this accumulated conflicting information from sources not identified in the Benson affidavit. Several of these chiefs were not available for cross-examination on this issue. Sterritt probably followed his standard procedure when drafting the Benson affidavit. He probably prepared a first draft including a list of geographical features for review by Benson, as he did with other affiants. The Benson affidavit is therefore probably based upon information received from Sterritt's informants not identified in the affidavit. The boundary description also conflicts with other sworn testimony of Mary McKenzie, the Chief of the House claiming the territory. It cannot be regarded as reputation evidence in these circumstances. It is submitted also that Ex.646-9A is based largely upon Sterritt's working maps information which he accumulated over the years, his extrapolations and rationalization of conflicting information. The fact that there are several false statements in the Benson affidavit furthermore supports the conclusion that either those are not the words of Richard Benson or his evidence is unreliable, or both. The affidavit is not reliable. The Ex.646-9A Gyolugyet boundaries therefore have no basis in reliable evidence. The unreliability of the Gyolugyet boundary evidence adversely affects the boundary evidence for all neighbouring House territories.

**(c) Canada's Written Summary.**

### GYOLOGYET — XSAGAN GAXDA (KULDO CREEK) TERRITORY

**INTRODUCTION 1:**

This territory is located approximately 5 miles northwest of Kuldo. This area is described in the affidavit of Richard Benson (Exhibit 661-EW, Section A). The Plaintiffs' submissions on this area are found at pages 152 to 157 of Volume VI of their final argument.

**CONCLUSION 2:**

There is evidence that this territory was used for hunting and trapping between 1935 and 1951. It is clear that the territory has not been used since 1951, or over 30 years, which constitutes proof of abandonment.

**3.** At page 150 of Volume VI of their final argument, the Plaintiffs' submissions refer to the evidence of Mary McKenzie concerning this territory. Mrs. McKenzie's testimony concerning trips her husband Ben McKenzie and Marian Jack made to this territory are inadmissible hearsay. Mrs. McKenzie stated that she had never been on her own territory (v. 7, p. 426). Mrs. McKenzie stated that she went to her husband's trapline because he was prepared for trapping, he had cabins on the territory, that trapline was closer to Gitanmaax, and as a result "our territory, it hasn't been used" (v. 7, p. 426).

**4.** Richard Benson testified that after 1944 he trapped with Abel Tait on this territory (Exhibit 661, pp. 35-6). He trapped on the territory for several years, both in the late fall and in the spring (Exhibit 661, p. 37). While they were trapping they camped at an "big open place" called Luu Lax Mihlit (Exhibit 661, p. 37). In addition to Abel Tait, Mr. Benson was on the territory with Steve Morrison, Charlie Hillis, Pete Muldoe and Jeff Harris (Exhibit 661, p. 38). Mr. Benson trapped fisher, marten, beaver and mink on the territory (Exhibit 661, pp. 37, 39). While trapping he went up to the head of Kuldo Creek (Exhibit 661, p. 37).

**5.** Mr. Benson last trapped on this territory in 1951 because fur prices collapsed (Exhibit 661, pp. 39-40, 184). 1951 was in fact the last year that Mr. Benson trapped anywhere.

**6.** It appears that when Mr. Benson was on this territory trapping, he also hunted for moose and goat (Exhibit 661, pp. 49-50). Mr. Benson maintained the trails while he was on the territory (Exhibit 661, p. 51).

### GYOLOGYET — XSANA LO'OP (SHANALOPE CREEK) TERRITORY

**INTRODUCTION 1:**

This territory is located northwest of Gyologyet's Kuldo Creek territory along the Nass River. Major features include Shanalope, Sanskisoot, Santolle and Mike Creeks, and the Kwinageese River. The territory is described in the affidavit of Richard Benson (Exhibit 661-E, Section B). The

Plaintiffs' submissions concerning the area are found at page 158 of Volume VI of their final argument.

**CONCLUSION 2:**

There is no evidence before the Court that this territory was used or occupied by the Plaintiffs. Therefore, the Plaintiffs have not established that they have any aboriginal rights to this area.

**EVIDENCE 3:**

Although Richard Benson swore an affidavit concerning this territory, it appears that he never hunted or trapped on it (Exhibit 661, pp. 144-5). It appears that Richard Benson gained his knowledge about this territory when he was travelling in the area and going up to the Taylor River territory of Gyologyet. He testified that he met Joe Danes, the former Gyologyet, at a place called Win Skahl Guuhl in 1936 (Exhibit 661, p. 28). Win Skahl Guuhl is a canyon on the Nass River near Mike Creek (Exhibit 661E, p. 5). Benson testified that the Joe Danes party was trapping in Gyologyet's territory which, given the location of the camp, was probably the Shanalope Creek territory. Joe Danes was said to have a cabin at Xsa'an Lo'op (Exhibit 661, pp. 112 and 129). Joe Danes died in 1934 (Exhibit 853 (19), p. 1).

**4.** Walter Wilson testified that there was a place near the junction of the Kwinageese and Nass Rivers, on the east bank of the Kwinageese, where trappers from three clans would go in the fall to catch fish for their winter supply (Exhibit 602A, p. 32). This place was called An Tsok. Mr. Wilson also testified that he flew to that area two years ago and found that the cabins there had all collapsed (Exhibit 602A, p. 32-3). There is no evidence that Wilson was at this area when it was actually being used for the purpose he described.

### GYOLOGYET — XSIHL GUUGAN (TAYLOR RIVER) TERRITORY

**INTRODUCTION 1:**

This territory is located along the Nass River in the northwest corner of the Gitksan claim area. Major features of the area include the Nass and Taylor Rivers. The territory was described in the affidavit of Richard Benson (Exhibit 661-E, Section C). The Plaintiffs' submissions on this area are found at pages 158 to 163 of Volume VI of their final argument.

**CONCLUSION 2:**

The only evidence of use of this territory is Richard Benson's testimony about his one trip into the area in 1935. This evidence is insufficient to establish that the Plaintiffs have continuously used and/or occupied this territory.

**3.** Richard Benson testified that he trapped along the Taylor River in 1935 with Marianne, Tommy, and Jasper Jack (Exhibit 661, p. 19). Benson trapped the right side of the Taylor River travelling north with Jasper Jack for four days (Exhibit 661, pp. 110-1). Marianne and Tommy Jack trapped the other side of the creek and Benson estimated that he travelled 35 miles from the mouth of the Taylor River (Exhibit 661, p. 111). On this trip, the Benson party hunted moose for food and trapped beaver and marten (Exhibit 661, pp. 26 and 107-8). Mr. Benson testified this was the only trip he ever made to the Taylor River territory (Exhibit 661, p. 114).

### Part 3. Antgulilbix — South, (Andamhl).

#### (a) The Plaintiff's Written Summary.

Mary Johnson testified to this territory in her evidence at trial.

Territorial name and territory are referred to in the telling of the ancient adaawk. The Gitksan trace their ownership rights to these adaawk. This more evident in the evidence of Mary Johnson.

Mrs. Johnson told the adaawk of the one-horn goat. In this adaawk, the people found a great fireweed and called it G'ilhaast and this is the name of the Fireweed Clan, Giskaast, today. (V. 11, p. 675). The one-horn goat was taken as a crest of the Giskaast Clan and according to Mrs. Johnson was used by her uncle, George Williams, previously the holder of Tsibessa. In telling this adaawk, Mrs. Johnson explained how when the people left T'am Lax Amit in ancient times Antgulilbix split off from Hax Bagwootxw and the Clan formed a village on a mountain behind:

> Glen Vowell Village and they call this mountain "where the moon shines on", that's andamhl.
>
> M. Johnson, (V. 11, p. 678).

Mrs. Johnson described the name of Andamhl as the "ancient name of that mountain" (V. 11, p. 678). The village on that mountain in the adaawk was called Wilt Gallii Bax. The House of Antgulilbix and Tsibesaa owns the territory where Wilt Gallii Bax is located (V. 11, p. 679). The ancient village of Wilt Gallii Bax where they hunted for groundhogs is on the mountain called Andamhl (p. 679).

In the adaawk, Mrs. Johnson gave the names of two features of her territory at Andamhl. In this way her House asserts its ownership and authority over the territory in respect of other Chiefs and Houses.

Mrs. Johnson's great great grandmother and her grandmother, Edith Gawa, told her about the village of Wilt Gallii Bax:

> They said it was a village and they also got feast Houses there, they said, and they used to invite the village — surrounding villages for the feast, for their feast.
>
> M. Johnson, V. 11, p. 680, l. 19-22

This, they said, was in very ancient times. Mrs. Johnson also went with her grandmother through the very small trails to where the village used to stand on the mountain (V. 11, p.680).

Mrs. Johnson has heard the adaawk of the one-horn goat given in the feast (V. 11, p. 699). This adaawk was given publicly so that the other Chiefs could hear them:

> . . . so they can understand and they never forget because, like Gyolugyet says, the Indians are not supposed to use any other crest besides your own crest. That's why they tell the adaawk in the feast House and they know, everybody knows whose crests they are.
>
> M. Johnson, V. 11, p. 700

This adaawk is known within the Gitksan community and she was taught it in particular by her grandmother and her great great grandmother. Similarly other adaawk, including that of the grouse, and Madiik, are known among the Gitksan because their grandmothers and uncles recounted them (V. 11, p. 700).

The histories of the crests and the relationship of those crests to the territories underly the territorial ownership of Antguililbix's House. Public telling of the adaawk and community knowledge are essential aspects of the adaawk.

Crests and territory are also referred to in the songs of the Gitksan. Mrs. Johnson spoke about the importance of songs to the Gitksan:

> Well, they are so important because it's about their hunting ground and all their crests and all the names, all the crests are their power, everything is their power . . . Dax Gyat. It will be passed from generation to generation. It won't be forgotten until the end of the world.
>
> M. Johnson, V. 12, p. 763, l. 1 - 11

The song sung by Mrs. Johnson in Court was a very ancient song:

> It's about the ancient history that they will tell another Chief, then the Chief will compose the song about their adaawk.
>
> V. 12, p. 769

The fishing site of Antgulilbix at Gwin Disygenn was located in close proximity to her House hunting territory. There used to be a smokeHouse located at this fishing site. It used to be located at the point where the road turns into Glen Vowell. (p. 771).

Mrs. Johnson identified the Andamhl site as being a mountain behind Glen Vowell village (V. 12, p. 780). Mrs. Johnson identified Exhibit 17-9-A as a map of Antgulilbix's territory owned by her House. (p. 780-81). On the map she pointed out the mountain called andamhl and the creek called Xsu Wil Gall Bax (p. 781). Mrs. Johnson also identified the creek of Xsan Max Hlo'o as a boundary. (p. 786). On the other side of that boundary the territory belonged to Ma'uus.

The presence of House members on the territory is an element pertaining to the House's knowledge of the territory. Mrs. Johnson said that her great great grandmother used cedar bark for dye from the territory. Her aunt Emily Latz hunted and trapped on the mountain in the territory (p. 792). She was told about the territory from her great great grandmother. She was told that it passed from generation to generation, like the rest, like all the mountains (p. 792).

As to the ownership of this territory, Mrs. Johnson said, they call this mountain "Antgulilbix's hunting ground" (V. 13, p. 794).

Mrs. Johnson used to pick blueberries behind the vegetable farm where a little creek runs backwards and this is how the creek got its name "Wilt Gallii Bax" (V. 13, p. 795).

Mrs. Johnson testified as well that her brother Stanley of the same House, trapped on this mountain and hunted groundhogs on the top of the mountain (V. 13, p. 796).

Mary Johnson took the name of Antgulilbix in 1982 when her aunt, Emily Latz, died (V. 10, p. 624). One of the crests of her House was carved on a pole belonging to Antgulilbix. It is a pole in Kixpiox with the crest of a whale. Mrs. Johnson told of the adaawk belonging to the House and how Antgulilbix received the crest of the whale. This adaawk also tells the history of Gwin Lax Nisims (V. 12, p. 747).

Mrs. Johnson also testified that the names of people in her House are the names referred to in the adaawk. For example, the history of the man Gyadim Lax Tsinaast, is the name for a clearing on the mountain in the territory at Andamhl. The story attached to the name is the story of a man who lived in the hills and who was very ugly. And when he arrived at a feast they threw a blanket over him. They then made a mask of him, which was very funny. (V. 13, pp. 792-793).

Mrs. Johnson testified on cross-examination that she was told a few days before testifying that the territory on the other side belonged to Jonathan Johnson, Ma'uus (p. 787). Her grandfather never mentioned this territory to her, but she believed what Jonathan Johnson said (p. 790). Mrs. Johnson also identified another large creek on her territory called Xsu Wil Masxwit (p. 790). That creek flows from the mountain on the territory called Wil Masxwit.

Mrs. Johnson was cross-examined about the difference between her evidence and her interrogatory affidavit, August 7, 1986, and it was suggested that she was not aware that Ma'uus' boundary was different and she replied:

> No. I was told by my grandmother and Aunty Emily, later, that our boundary is — is Xsan Max Hlo'o. That's the creek and we didn't claim Ma'uus territory.
>
> (V. 13, p. 843).

Later in her cross, Mrs. Johnson verified:

> No, we didn't say we owned the whole mountain, we said that — that there is a clearing where Gyadim Lax Ts'inaast lives. But right on top of the mountain is Ma'uus, they showed me on the map. But . . . is where this mean man lives, and that's where Xsan Max Hlo'o runs down, that's our boundary.
>
> (V. 13, p. 850).

On this point, the evidence of Mrs. Johnson is consistent that on the other side, i.e. to the north of Xsan Max Hlo'o shown as number 320 on Map Exhibit 17-9-A, dated May 13, 1987, is the territory of Ma'uus.

On re-examination, Mrs. Johnson was asked about the territory to the north of andamhl, and she said:

> It's so plain, sir, this Wil Masxwit. The mountain is called Wil Masxwit. That's where our ancestors got the mountain goat, main food, and groundhog that they used the skin for the feasts, and this Wil Masxwit and Xsu Wil Masxwit comes from Wil Masxwit and runs into Kispiox River. So they call this Xsu Wil Masxwit — Antgulilbix' Genip Jap. That means that Antgulilbix' hunting territory in the ancient time. So next to Xsu Wil Masxwit is Ma'uus' boundary. . . .
>
> (V. 15, p. 989).

Following this, Mrs. Johnson was asked if, before talking to Mr. Neil Sterritt, did she know where Ma'uus' territory was and she said: "Yes." (p. 989). She said that she knew where Ma'uus' territory was before she spoke to Mr. Sterritt about the map: "Ever since I was small." (V.15, p. 990).

Mr. Marvin George testified that he drew Ex-17-9-A and dated it May 13, 1987 (V. 218, p. 15840). He said:

> This is a map of Antglilibix and it's on a scale of 1:50,000 also, and again a topographic series, and again from a base that was prepared for me by Terra Surveys. And the boundaries from — on this particular map differ from the boundaries on the previous map (X-19) and would be based on information that was brought to me by Neil Sterritt.
>
> (V. 218, p. 15840)

Mr. George explained what led him to make the change:

> It would be previous to May 13, the date May 13 on this map, which would indicate that's the day that I finished preparing this actual map, but the information would have come to me before that. . . . Again information from Neil Sterritt, his understanding of where Xsu Wil Masxwit was. It was identified as Date Creek, and the location of Date Creek is the — where Xsu Wil Masxwit as labelled. It's — Xsu Wil Masxwit. Date Creek on the NTS series is where this particular feature is labelled on this map. (X-17-9-A) (V. 218, p. 15841)

As a result Mr. George made the alteration which was depicted on Exhibit 646-9A.

Mary Moore testified as to the territory, owned by the House of Luutkudziiwus, immediately to the south of the Antgulilbix territory: Ex. 593. In the portion of her description of the boundary which abuts to the Antgulilbix territory she said:

> . . . Here it runs east about two miles along the height of land to Andamahl (Hazelton Peak) and it continues east to the source of Xsi Moolaa (Alipakh Creek). It then runs down Xsi Moolaa to Xsan (Skeena River), it then runs down the center line of Xsan to the starting point.
>
> M. Moore, Ex. 593, para. 5

Mrs. Moore stated in her affidavit that Antgulilbix's territory was to the north. When examined on her affidavit Ms. Moore said that the creek Xsi Moolaa is also called Sika Doak Creek:

> M. Moore, Ex. 593-A, p. 10, l. 32 - 33.

She said that this creek was the boundary between Antgulilbix and Luudkuziiwus.

Ex. 593-A, p. 11, ll. 1 - 8.

She also said on the other side of the mountain bordering her territory was the territory of the Kitwancool people and the name of the mountain is Andamahl: Ex. 593-A, pp. 12-13, l. 39 - 2 This examination occurred on November 30, 1988. There were no other questions put to Mrs. Moore concerning the location of the boundary with Antgulilbix or the fact that Antgulilbix owned the territory to the north of the described boundary.

Mr. Jeffrey Harris, Sr. spoke to the Ma'uus territory to the north of the Antgulilbix territory in Ex. 610. In paragraph 12 of the affidavit he said that "to the south lies the territory of Antgulilbix".

In the boundary description given by Mr. Harris, Sr., of the Xsa Gay Laaxan territory (Ma'uus) he said in part:

> . . . From Wil Gwil the line runs south along the height of land to the height of land near the head of Xsu Wil Maxswit (main tributary of Lower Date Creek, un-named on government maps), and then down and along Xsu Wil Maxswit (un-named creek on government maps) to its confluence with Lower Date Creek, here the boundary runs up Date Creek, about two miles, then the boundary runs east, south of Ansa Luu Hlo'os (un-named mountain on government maps), to Xsi Anspayaxw (Kispiox River) near the Kispiox Bridge . . .
>
> J. Harris, Sr., Ex. 610, para. 11

Mr. Harris, Sr. was cross-examined on his affidavit on December 6, 1988. He stated that Henry Brown had a trapline on the Ma'uus territory and he belonged to the House of Ma'uus. J. Harris, Sr., V. 158, p. 10074, 1. 25, Cross.

Mr. Harris was asked no questions about the boundary description between Ma'uus and Antgulilbix. He was not examined about the ownership of the territory to the south being in the House of Antgulilbix.

On both the south and the north of the Antgulilbix territory at Andamahl, the Defendants chose not to examine on the boundary description. Hence, they must now be taken to have accepted those descriptions.

As to the mapping, Marvin George prepared Exhibit 19, the map of the traditional territory of Antgulilbiiksxw, on a scale of 1:50,000, "based on the information on the original coded map": M. George, V. 218, p. 15840, ll. 25 - 28. As to Exhibit 17-9-A, Mr. George prepared this map entitled "Territory of Antgulilbix", dated May 13, 1987 on the basis of information "brought to me by Neil Sterritt": M. George, V. 218, p. 15840, ll. 35 - 41. Exhibit 17-9-A was prepared by Mr. George before May 13, 1987, but on what exact date Mr. George could not say: V. 218, p. 15841.

Subsequent to the mapping of the boundary of the territory of Antgulilbix shown in Exhibit 17-9-A, there was a further change to the boundary of the territory. This resulted:

> Information from Neil Sterritt, his understanding of where Xsu Wil Masxwit was. It was identified as Date Creek, and the location of Date Creek is the — where Xsu Wil Masxwit is labelled. It's — Xsu Wil Masxwit is Xsu wil Masxwit. Date Creek on the NTS series is where this particular feature is labelled on this map.
>
> M. George, V. 218, p. 15841, ll. 17-23

As a result of this additional information an alteration was made to the boundary of the territory and that was shown on overlay map (646) 9-A: V. 218, p. 15841, 1. 24 - 27.

Mr. Sterritt testified that he provided the information upon which Exhibit 19 was drawn: N.J. Sterritt, V. 126, p. 7738, ll. 33-41. He testified that he received the information from this map "from various people". He named David Gunanoot as one of those who "in the 1970's" provided him with information about this territory. He also received information from his father, Percy Sterritt (uncle), Albert Tait, and others: V. 126, p. 7739, ll. 6 - 15.

Mr. Sterritt went on to explain how the assumption that he had operated on that Date Creek was Xsu Wil Masxw was wrong:

> . . . It was — while listening — and I had gone through interviews with Mary Johnson under that assumption, and it was while listening to the cross-

> examination of Mary Johnson in Smithers, I was in the Court and listening, and I realized that there was something wrong, something wasn't fitting with — and I didn't know what it was. There was just something didn't seem right in terms of what she was explaining, because she was saying it correctly, but what she was saying and what my understanding was. So I did not talk to her, I went to my Uncle Percy, and I asked him, "Can you tell me which way — or where Xsu Wil Masxw is?" And he said, "Yes. It's Date Creek, but it turns right when you go farther up Date Creek." And I confirmed that, I talked to Jeff Harris as well, and I asked him if he could show me where Xsu Wil Masxw went. So if you — in fact, if you come up Date Creek.
>
> Q. Okay. Now, just let's — to assist us here, if we can start at the Kispiox river, where does Date Creek, the creek that's named Date Creek start?
>
> A. You see on the map Agwedin Reserve, A-g-w-e-d-i-n, and I'll just show you where Date Creek goes. Date Creek follows this line all the way up to the mountain tops to its source. Xsu Wil Masxw is the creek from here on up here. And the first time that I knew that, was after I went to my uncle and then to — or to Jeff Harris and then to my uncle, and determined that Mary Johnson was describing her territory right, but I — what I couldn't get straight is what she was trying to say about the mountain when she was on the stand, and it just didn't fit. So then when I established that in fact the boundary runs up Date — or Xsu Wil Masxw, to the mountains here, and Wil Maxsw is this mountain in this area, and then everything made sense, I was able to sort that out.
>
> So that was a major assumption that I made, and a problem — I've encountered that kind of a problem before but not to this degree where one creek can have over its length, three different names. And I was unable to determine what the balance of the name of the creek was, of Date Creek, but I established that Xsdu Wil Masxw continued on up to the north-west.
>
> Q. All right. And do you recall about when it was that you had the conversation with Percy Sterritt regarding the positioning of Xsu Wil Masxw?
>
> A. Well with Jeff Harris, I went to see him right away that weekend. I believe that was a Friday, and so on the following Saturday, that would be about June the 30th, I went and saw Jeff Harris, and either the same day or within a very short period of time I saw — I went and asked Percy as well, my uncle, Percy Sterritt.
>
> N. Sterritt, V. 126, pp. 7739 - 740.

As a result of Mrs. Johnson's testimony, Mr. Sterritt came to understand that the Xsu Wil Masxw is only that portion of Date Creek on the northern run of the creek to the mountain tops. This he was told by Jeff Harris and Percy Sterritt. The boundary was described by Jeff Harris in his affidavit. It was this piece of information which Mr. Sterritt subsequently passed on to Mr. George and which Mr. George mapped on Exhibit 646-A.

The information spoken about in testimony by Mrs. Johnson was correct. Mr. Sterritt and Mr. George misunderstood the description and incorrectly mapped it. This was not a weakness in the source or body of the information, but a weakness in the mapper's comprehension.

### (b) The Province's Written Summary.

The House of Antgulilbix claims two territories, one near Kispiox in the Date Creek area, referred to herein as Antgulilbix South, and the other on the Upper Kispiox River referred to as Antgulilbix North. Unlike most other territories, the Date Creek territory boundaries are not set out in a territorial affidavit. Marvin George stated that the boundaries for this area were based: ". . . on the affidavits that described the territories to the north and to the south of them, and the affidavits that surrounded their [Mary Johnson, Olive Ryan] territories, and I relied on the information as given in the proceedings at trial. Q:That was — by that do you mean the testimony which they [Mary Johnson, Olive Ryan] gave at trial? A:Yes." Tr.217, p.15771, ll.18-25

The Antgulilbix South boundaries on map 9A differ from those on all the other maps exhibited at the trial relating to the territory as follows: Ex.19 (May 23, 1985), Ex.102 (October 1985), Ex.5 (May 2, 1987), and Ex.17-9-A (May 13, 1987). Evidence: Mary Johnson. In January 1987, Johnson swore an affidavit to which were attached answers to interrogatories indicating in Answer 59(c) that the attached map of the Date Creek territory (Ex.19), depicted her House's territory in that area (Tr.13, p.840, ll.1-24). On her Examination for Discovery in April 1987, she testified that Ex.19 was an accurate depiction of her territory (Tr.13, p.842, ll.6-12). On May 28 and 29, 1987 Johnson stated that her territory was accurately shown on another map (Ex.17-9-A) (Tr.12, pp.781, ll.6-11; Tr.13, p.785, 1.39 to p.786, 1.8; p.838, ll.9-17). The boundaries on Ex.17-9-A are significantly different from those on Ex.19. Johnson agreed that there had been a significant change in the location of the northern boundary of the territory between Ex.19 and Ex.17-9-A. A mountain known as Ansa Luu Hlo'os, a prominent landmark in the area, appeared in her territory on Ex.19 but was outside her territory on Ex.17-9-A and was in the territory of Mauus, Frog clan (Tr.13, p.848, 1.39 to p.850, 1.13). Johnson explained that one week before her testimony, Sterritt had shown her an old map indicating that, according to Jonathan Johnson, the territory north of Date Creek (Xsu Wil Masxwit) was the territory of Ma'uus (Tr.13, pp.787, ll.3-9; p.788, 1.46 to p.789, 1.3; p.842, 1.37 to p.843, 1.11; p.851, ll.14-22). Counsel for the Province requested production of the map to which Mary Johnson was referring. Counsel for the Plaintiffs advised the Court that according to Sterritt, the map in question had been Ex.17-9-A (Tr.13, p.850, ll.44-47; Tr.14, p.864, ll.1-14). One of the results of the change from Ex.19 to Ex.17-9-A was to decrease the northern part of Johnson's territory and to increase the Ma'uus territory. One result of further changes between Ex.17-9-A and Ex.646-9A is the addition of a substantial area to the northwest section of Johnson's territory. This added area also has a boundary adjoining the Kitwancool claim area. There is no evidence to prove the boundaries of this additional portion of the territory. There are no neighbours' territorial affidavits to prove the boundary adjoining the Kitwancool claims. Jeffrey Harris Sr. swore a territorial affidavit in June 1988 which deals with the Ma'uus and Wii Elaast territories to the northeast of Antgulilbix South, but it does not describe Johnson's western or any of her House's territorial boundaries (Ex.610).

Neil Sterritt. Sterritt stated that Ex.19 reflected information which he gave to Marvin George. Sterritt obtained the information from David Gunanoot in the 1970s, Neil Sterritt Sr., Percy Sterritt and Albert Tait — "many, many people." Sterritt made a mistaken "assumption" that Date Creek was Xsu Wil Masxw for its whole length. Percy Sterritt later corrected this mistake (Tr.126, p.7738, 1.33 to p.7740, 1.26).

Sterritt asserted that Ex.19 was produced in response to demands for interrogatories. (Tr.135, p.8396, ll.13-18). Exhibit 19 however was dated May 23, 1985 before any interrogatories had been delivered (Tr.135, p.8398, ll.16-39) and at a time when there was no pressure created by interrogatories (Tr.135, p.8399, ll.5-9). Sterritt stated that Ex.19 was "based on the information that he had at the time" (Tr.135, p.8399, ll.22-34). Sterritt agreed that the information he obtained from the hereditary chiefs was the basis for Ex.19, "but it wasn't very much information" (Tr.135, p.8414, ll.32-37; Marvin George: Tr.219, p.15955, 1.45 to p.15956, 1.4). Sterritt said he learned about the change to Ex.19 altering the northern boundary just before Johnson testified (Tr.135, p.8401, ll.21-26). Sterritt did not recall that he had shown a Jonathon Johnson map or Ex.17-9-A to Mary Johnson prior to her testimony. He said: ". . . Mary mentioned that area, I said, 'I understand' or something to the effect, 'that Jonathon Johnson has said the Gitsum Ganao own Ansa Luu Hlo'os', and then she in turn said, 'That must be what my Auntie Emily is referring to, that the boundary goes down Xsan Max Hlo'o'" (Tr.135, p.8410, ll.21-28). Sterritt continued, "What I recall is that as a result of that discussion, I went away with — and Marvin redrafted it [the map] and we brought it back" (Tr.135, p.8410, ll.31-33; p.8420, 1.17 to p.8421, 1.42). Jonathan Johnson provided this information in 1965 to Wilson Duff. Sterritt did not pass this information to Marvin George. He agreed that ultimately it was an important piece of information. "It wasn't something that had gone into the preparation of the maps. It was information that was available to me, and I preferred to work with the hereditary chiefs and get the information from them" (Tr.135, p.8414, ll.12-31). Sterritt said further: "... [T]here was some information that I discovered later while Mary was on the stand that made me realize that I misunderstood which creek was Xsu Wil Masxw ... [I]t wasn't until in trial while listening to Mary that I realized that there was something wrong with the information that I had." Tr.135, p.8397, ll.37-40; Tr.135, p.8398, ll.4-6.

While Sterritt was sitting in the Courtroom during Johnson's testimony, he came to the conclusion that he hadn't understood what people had told him with respect to Date Creek. He then discussed the boundary with Jeff Harris Sr. (Tr.126, p.7738, 1.33 to p.7740, 1.26; Tr.135, p.8400, ll.28-32; p.8418, ll.19-29). In September 1988, Sterritt still did not know the name of Date Creek beyond the junction of the northwest tributary (Tr.126, p.7740, ll.23-26; Tr.135, p.8416, ll.21-33). After Johnson approved Ex.17-9-A at trial, Sterritt had further changes made to the boundaries based on his subsequent information about Date Creek. These changes are reflected on Ex.646-9A. As a result of the latest changes to the boundaries, Wii Elaast and Amagyet obtained a slice of territory between two parts of Ma'uus. Johnson's territory was enlarged at the expense of Ma'uus. (Tr.135, p.8416, 1.34 to p.8417, 1.9). These changes between Ex.17-9-A and Ex.646-9A occurred after Johnson gave her evidence and identified her territory as that shown between the heavy lines on Ex.17-9-A (Tr.135, p.8417, ll.10-15).

It was Sterritt's own assumption that Date Creek was Xsu Wil Masxw beyond the northwest tributary. He did not consider this to be an "extrapolation". Sterritt used the term "extrapolation" in the sense that:

> "early on when I was — had a certain amount of information and not necessarily complete information, attempting to determine where the boundary might be between those two points I would extrapolate and draw a boundary that may or may not have been an accurate boundary."
>
> Tr.135, p.8418, ll.13-18

Sterritt agreed that Mary Johnson was a chief and a person with authority (Tr.135, p.8421, 1.46 to p.8422, 1.12). He agreed also that the Ex.646-9A boundaries were not based upon a territorial affidavit sworn by Johnson:

> "Q: ... [T]he boundaries on map 9A of her territory have been spoken to by others than Mrs. Johnson?
>
> A: There are neighbours, yes, who have, for which affidavits have been done.
>
> Q: Yes. But not Mrs. Johnson?
>
> A: No." Tr.135, p.8423, ll.17-23

## Conclusions

The northwestern portion of the Johnson territory on Ex.646-9A is not based on any evidence. This applies particularly to the part of the boundary adjoining the Kitwancool claim area. The territory has been extended to cover that gap and to fill in the boundaries. George has ignored Johnson's evidence that her House's territory was accurately depicted on Ex.17-9-A. Exhibit 646-9A, Ex.19 and Ex.17-9-A all show different boundaries. Johnson also confirmed the accuracy of Ex.19. Sterritt obtained information on the boundaries from persons other than Mary Johnson. He extrapolated from that fragmentary information and had Marvin George prepare Ex.19. Johnson must have been relying on Sterritt when, on her Examination for Discovery in April 1987, she said Ex.19 was accurate. Sterritt contributed further information from Wilson Duff's 1965 notes which led to a change in the Ex.19 boundaries and to George drawing Ex.17-9-A. Johnson then stated that Ex.17-9-A was correct. After Johnson's evidence on cross-examination, Sterritt conducted further research and spoke to at least one other chief which led to another alteration in the boundary. This latest information, not based on any admissible trial evidence, led George to draw Ex.646-9A boundaries of Johnson's territory after her testimony and in conflict with her sworn evidence. Much of Sterritt's information upon which Ex.19, Ex.17-9-A and Ex.646-9A are based was obtained from people who were living at the time of Johnson's cross-examination. They were not identified as informants for Johnson's territorial boundaries. The Defendants did not learn about the role of these other Sterritt informants until Sterritt's testimony in 1988. By that time, Albert Tait and David Gunanoot had passed away; Neil B. Sterritt Sr.'s cross-examination had been completed and the Plaintiffs had not produced Percy Sterritt for cross-examination. The boundaries were also based on Sterritt's mistaken assumptions about Date Creek and probably upon his extrapolation from sparse data. Johnson knew very little about her boundaries. She relied on Ex.19 and Ex.17-9-A. Johnson's evidence as to her boundaries on Ex.17-9-A and Ex.19 is not reputation evidence. It is hearsay and is not admissible. It conflicts with her prior testimony. Even if admissible, her evidence conflicts with the Ex.646-9A boundaries. The Ex.646-9A boundaries for Antgulilbix South are not based upon admissible or any evidence and therefore are inadmissible. If the boundaries of Antgulilbix South are unreliable, those of the neighbouring territories must follow, carrying with them in turn their neighbouring territories. Alternatively, a gap is created in the Claim Area belying the Plaintiffs' claims to ownership and jurisdiction of the entire Claim Area.

### (c) Canada's Written Summary.

This territory is located immediately west of the village of Kispiox. Major features on the territory include the Skeena River, the Kispiox Range of mountains and Upper Date Creek. The territory was described by Mary Johnson in her testimony. Jessie Sterritt also appears to have testified about this area. The Plaintiffs' submissions concerning the territory are found at pages 81 to 94 of Volume VI of their final argument.

### CONCLUSION 2.

The evidence is clear that the village called Wilt Gallii Bax located on the mountain of Andamhl was abandoned long before Mary Johnson was born. There is minimal evidence of hunting, trapping, berry picking and fishing on this territory. This evidence is insufficient to establish any aboriginal rights to the area. Furthermore, there is no evidence that the territory has been used for any of these purposes within recent decades.

### EVIDENCE 3.

Mary Johnson testified that the adaawk of her House stated that in ancient times there was a village on the mountain behind Glen Vowell (v. 11, p. 678). The village is identified by the name of Wilt Gallii Bax. When she was younger Mrs. Johnson was taken by her grandmother to the place on the mountain where the village is said to have stood (v. 11, p. 680). It is evident that this village was abandoned long before Mary Johnson's lifetime.

**4.** Mrs. Johnson also identified a fishing site at Gwin Disygenn. There used to be a smokeHouse at this site (v. 12, pp. 770-1). This site is depicted on Exhibit 358-22. It is located on the Skeena River near the village of Glen Vowell. It may, or may not be, located on the Sik-e-dakh I.R. #2.

**5.** Mrs. Johnson testified that her great-great-grandmother used cedar bark from the territory and that her aunt trapped at Xsu Wil Maxxwit (Date Creek) (v. 13, pp. 790-1).

**6.** Mrs. Johnson also testified that she used to pick blueberries behind the "vegetable farm" near the creek Wilt Gallii Bax (v. 13, p. 795). This creek is depicted on Exhibit 17-9-A. That map indicates that the creek flows through the Sik-e-dakh Reserve before it enters the Skeena River. It is unclear whether Mrs. Johnson was picking berries on the reserve, on private land, or on Crown land.

**7.** Mrs. Johnson also testified that her father took her brother Stanley Wilson onto the territory when he was young and showed him where to set traps (v. 13, p. 796). Mrs. Johnson's statements that her brother trapped on the mountain and hunted groundhogs on the top of the mountain must have been based on hearsay because it appears that Mary Johnson did not accompany her brother on these trips (v. 13, pp. 796-7). The same submission applies with respect to Mary Johnson's statement that Fred White went to the territory before Stanley did (v. 13, pp. 797-8).

## Part 4. Gidsdaywa, House of Kaiyexweniits, (Alfred Joseph).

### (a) Plaintiff's Written Summary.

The holder of the name of Gisdaywa is Alfred Joseph. Gisdaywa is in the Gitumden Clan. There is one territory owned by the House (named Kaiyexweniits) and that is located at Bewenii Ben (Owen Lake). Alfred Joseph testified about this territory in his evidence.

### i. Bewenii Ben (Owen Lake) Territory

### (a) Succession of the Territory in the Feast

Alfred Joseph succeeded to the name of Gisdaywa in 1974 at the headstone feast for Thomas George. Prior to this feast, at the funeral feast, it was announced by Woos and Kanoots that Alfred would be the successor to the name of Gisdaywa. At this feast as well it was announced that the territory at Bewenii Ben belonged to Gisdaywa (v. 22, p. 1517). A year later when he took the name the territory was mentioned at the feast and the place names on the territory including the boundary were spoken of at the feast and his aunt, Mary George, spoke of the names there (p. 1517). It was at this feast as well that Alfred performed Gisdaywa's kungax.

The critical importance of the feast for the sucession of territory and names is also shown by what Mr. Joseph paid for the name of Gisdaywa. He contributed $1,400.00 in cash and about $1,400.00 in goods at the three feasts including the headstone feast at which he got the name. In total, members of his House and the members of the Gitumden Clan contributed $6,000.00 at each of those feasts (V. 22, p. 1516).

### (b) Crests

The ownership of territory by Gisdaywa and his House is evidenced in one of the crests of their House, the House of Kaiyexweniits. The black bear and bear cub is that crest. This crest came from an event that occurred on the territory and it is acted out today:

It is the dance that my grandfather, Joseph George, who was Gisdaywa at the time, used.

Mr. Joseph went on to say in his evidence that there was a song that went with that dance:

> (It) is acted out like when they see a bear on the side of the hill and the movements that this bear goes through when he is up there, how he moves.

Mr. Joseph said that the song was composed to reflect the way the bear moved. The movements of the bear were the same as the beat of the sound that was made for his grandfather. Mr. Joseph testified that the event was known by his grandfather and the dance is called the "black bear walk." (V. 23, p. 1591).

Gisdaywa also has a personal crest. The crest is the bow and arrow. Mr. Joseph pointed out in the photograph, Exhibit 62, Tab 5, the crest figure at the top of the pole, which is the crest of the bow and arrow. The figure on the pole faces east because:

> The song of Gisdaywa involves the people of the east, and that is something that happened between Wet'suwet'en and the people of Nascoteen.

The figure on the bottom of the pole is the man with the pack, also a crest. There is a burl sitting beside the fence and on the original pole at Hagwilget there was a burl on the ground beside the pole and whenever the Gitumden Clan put on a feast they put that burl on the back of a man as though he is packing and when the feast is over they took the pack off. The name of the pole is Esghel (V. 24, pp. 1607 - 1614).

Mr. Joseph recounted the history of the bow and arrow crest which goes with the performance of the kungax of Gisdaywa:

> "It's about a village where the whole population is wiped out by enemies that came in to raid the territory and there is only a girl that is spared, and she is the only one that is left in the village. And when she came out of hiding, back to the village, she started to cry and her teardrops turned into human eyes. And

> she picked up these human eyes and rubbed it on her bosom and out of that she became pregnant and had a boy. So she repeated the process and had another boy. The third time she done that she had a girl and the girl came out to be lame. And when the lame girl grew up she became very smart. And then they had a visitor and the visitors came and gave them presents. They gave them a small box and in the small box was two arrows and he gave one of those arrows to one of the boys and the other boy he gave another arrow. And the other present to the girl was a shovel.
>
> And the man told them that they were his children and he said that whenever there was any problem you can destroy anything with this arrow. So they hit the mountain with it and let the mountain burst.
>
> It is the same thing with the girl. The girl's present was that when she got that shovel the promise was made to the girl that all the lame girls that were born would be smart.
>
> And then the man built them a House and that is how the two boys and the arrow protected the people as the village grew. They protected them from all of the enemies by using this arrow that the man gave them. So this is the story of the arrow of Gisdaywa."
>
> A. Joseph, V. 24, p. 1603

This story is the history of the crest of Gisdaywa and as it relates to Gisdaywa's House so it relates to his land.

The crest of a bear is worked onto Alfred Joseph's blanket. He wore this blanket when he performed the kungax in 1974 when he received the name of Gisdaywa. Mr. Joseph also wore this button blanket at the All-Clans Feast on April 6, 1986 in Moricetown when the Chiefs and elders were present at the meeting (V. 22, p. 1518; V. 24, p. 1615; V. 33, p. 2115).

### (c) Training about Feast, Crest and Territory

The Chief's training and knowledge about the feasts and the role of the House and Clans in the feast was addressed by Mr. Joseph:

> "There is always feasts happening in the Reserve and the Hagwilget Moricetown. And there is times that they were invited to other villages and whenever what happened after they came home, they always — they analyzed what happened. They talked about a new chief, someone getting a new name and there is always talk about — they always had discussions about feasts and so you always knew what clan they were talking about because of the four clans that are living in each Reserve.
>
> A. Joseph, V. 22, p. 1515

Mr. Joseph also testified about how he learned about the territory belonging to Gisdaywa. He travelled into the territory with the (Thomas) Georges. They passed through Houston Tommy Creek which is located on Gisdaywa's territory. Alfred knew this because:

> "My grandfather and uncle have both used the territory and talked about it. And as we were passing through my aunt told me that that was part of our territory.
>
> A. Joseph, V. 23, p. 1550

Mr. Joseph said he knows the territory and place names:

> "The names that I knew along were told to me by my parents and grandparents and uncles. And travelling within the territory we were always told where to stop in case we were up ahead and someone is behind you so that you don't just keep going. There is always — you are always told if you are going to pick up

> something at a certain place, so that's why you have to learn all the names of places."
>
> A. Joseph, V. 23, p. 1585

Mr. Joseph described that he first heard about the territory from his grandparents when they were travelling up to the territory:

> "You were told that this is our land which we are travelling on now. And if we leave it we give another one, they tell you that this is that person's land.
>
> A. Joseph, V. 37, pp. 2423-24

The genealogy of Gisdaywa's House, Ex. 62-1 shows that the chiefly titles of the House and the property that attaches with it flow in the matriline. Alfred confirmed that the genealogy demonstrated the passing of the name from the previous name holders to Alfred and that this was done in accordance with Wet'suwet'en law (V. 23, pp. 1528-30). The genealogy indicates as well the previous name holders (now deceased) from whom Alfred learned about the territory.

Alfred also learned about the poles and history of Gisdaywa's House from his grandfather and grandmother (V. 33, p. 2155). Mr. Joseph identified the crests on the poles of his House in the photographs marked Exhibit 62-4,5,6 & 7 (V. 38, p. 2466).

Mr. Joseph himself was trained on the territory and he has a long history of connection to the territory. His first recollection was being around Bewenii C'eek, when his mother was taking water from the stream in winter time and he remembers worrying about his baby brother (V. 23, pp. 538-59). When he was on the territory with his family, his family members were mostly hunting, trapping and doing some fishing. His grandfather, Joseph Nahlooch, and his uncle, Thomas George, and his family, spent their time around Owen Lake. Alfred lived there until 1931 when his father died at which time he moved to Hagwilget with his grandparents. In 1936 Alfred recalls visiting Antoine Jimmy's family who were living in a log cabin on Gisdaywa's territory at the outflow of Owen Lake, called Biiwenii Teez Dlii. At that time his cousins, Thomas and Andy George, were trapping on the territory (V. 23, pp. 1539-41). Alfred recounted an occasion in 1936 when the former Noostel (House of Knedebeas) was returning from Pack Lake with a sled full of furs. There is a number of people, including Alec Sam, Sarah Seymour (Layton) and their younger sisters who were there (V. 23, p. 1542). Gisdaywa returned to the territory again in 1946 and helped Leonard George and his son take supplies into the territory by wagon. They went in to trap (p. 1545). Alfred was hunting again on the territory in 1950 with his cousin, Peter Gray (p. 1552). During 1950, his uncle Thomas George, was hunting and trapping on the territory with his sons and when they visited Alfred, they always talked about the territory (V. 23, pp. 1552-53). In 1967 Alfred drove to the territory to visit the place where his grandfather lived. In 1981 he went to the territory with Leonard George. And in 1982 he visited the territory with Johnny David (V. 23, p. 1553).

### (d) Caretakers — Sons of former Gisdaywa

The importance of the caretaker relationship was expressed in Mr. Joseph's testimony. He indicated that he had been kept informed about what was going on in the territory and how the territory was being used by his cousins, Andy George, Leonard George and Jimmy George. The sons of the former Gisdaywa, Thomas George, have "always been in the area" and they would tell Alfred what was going on on the territory (V. 23, p. 1555). After the former Gisdaywa passed on Alfred gave permission to Andrew, Leonard and Jimmy to continue to hunt and trap on the Bewenii Ben territory. And even though he was unable to be there regularly himself, the territory was used by members of his House and by Andy and Leonard George (V. 33, p. 2138).

Alfred also gave permission to other people in his clan (Gitumden) to hunt and trap on his territory, those included Matt Michell and Houston Tommy (V. 33, p. 2135). Matt Michell travelled with Alfred on his territory in 1983 and pointed out the parts of the territory he was using. (p. 2136).

Mr. Joseph was asked in cross-examination what activities House members were doing on the territory with his permission and to this he responded:

> "There are people from my House that are on there hunting, fishing or trapping."
>
> A. Joseph, V. 34, p. 2212

He said:

> "There is always some member of Kaiyexweniits on the territory for trapping purposes during the winter."

Alfred went on to say he gets fish from the territory from Leonard or Andy and

> "Whenever we are on the territory we always do fishing"
>
> A. Joseph, V. 35, p. 2237

### (e) Ownership determined by Name and Succession

Alfred Joseph expressed the basis for his House's claims to ownership of its territory:

> "Because my uncle, who was Gisdaywa before me, used and his family used it, and it's — it was said that it was their House territory. And my grandfather also used it. And when I was given the name, I took the name of Gisdaywa, I was told that it is where my territory was, so it just came with the name.
>
> A. Joseph, V. 23, p. 1589

In these words Mr. Joseph expressed the fundamental basis by which his House and the Chiefs of the Wet'suwet'en claim ownership to their territories. In response to the question how long Gisdaywa's territory has belonged to his House, he replied:

> "Our people say that it has been here as long as they remember. As long as the land was there, their territory was there."
>
> A. Joseph, V. 23, p.1551

Alfred Joseph spoke of the rights of the members of the House of Kaiyexweniits to the territory at Owen Lake:

> "They have a right to use the territory as long as they are members of the House of Kaiyexweniits still because at feasts we all together in the feast House and we have to share the territory. He has given permission to others to use the territoy such as Andy and Leonard George, who are not members of the House, but members of the House of Smogelgem (mother's House)."
>
> A. Joseph, V. 23, p. 1590

Alfred described his knowledge of the territories which bordered on the Owen Lake territory. He pointed out the points on the boundary of the territory at feasts (V. 23, pp. 1585 - 90). He testified that there had been no changes in the boundary of Gisdaywa's territory (p. 1594).

### (f) Description of the boundaries of Bewenii Ben

Mr Joseph proved the territorial boundary of the Owen Lake territory by reference to the geographical features of that territory. His description was consistent with the map of the territory, Exhibit 62-3, dated May 12, 1987. Mr. Joseph started his description of the boundary at a point seven miles west of the junction of Owen Creek and Morice Lake, a place called Biiwenii C'eek (V. 23, p. 1574). The boundary point was a location called "Oonus Yex" and on the north side of the Morice River a hill called "Tse Mii A'eec'en" (p. 1574, 1. 14-21). Mr. Joseph proceeded in his description south from the Morice River to the next geographic feature, Pimpernel Mountain, Tse Gheeweliiyh. From there Mr. Joseph described the boundary moving to Poplar Mountain in a southerly direction, Tse Kaal Wediintaan. From there, the boundary moved to just south of Biiwenii Ben to a place called Tsee Coh C'oo, which is a deadfall place. From there, he testified, the boundary moved to a range of mountains they called Dek'aay Zii Yes(p. 1575). And from there the boundary moved up to but below Parrot Lake running between the upper and lower Parrot Lake. From there, the boundary ran to a ridge north of Tsenii Yes. From this point the boundary ran west to a place called Guunyee T'aan Weediil Taan, which is a high point or ridge. From there the boundary runs to Taniits C'ekeen S'aay, which is the boundary between the territory of Kanoots (Madeek) and Dzel Teel (Morice Mountain). Mr. Joseph said it takes the south slope called Dzel Tel Tai, which is a trail (p. 1577). He then testified that the boundary crosses the Morice River where Houston Tommy Creek and where Antoine Jimmy had his cabin at the mouth of Houston Tommy Creek (pp. 1578-79). After crossing the Morice River, the boundary follows the valley of Houston Tommy Creek running northwest towards the peak called Seslii T'oogh, which is the headwaters of Houston Tommy Creek, or C'l Tay Toostaan Kwe, (p. 1579). Having reached the peak of that mountain, the boundary moves south toward Taniits Tsezel on that ridge and then from there moves back towards Tse Mii K'eec'en, where it started and moves across the Morice River.

In addition to describing the boundary of the Owen Lake territory, Mr. Joseph identified and named other geographical points within Gisdaywa's territory: V. 23, pp. 1581-84. Mr. Joseph was told about these places by the former Gisdaywa, Thomas George, and by his aunt, Mary George. They told him about the names and places on the territory. And these names and geographic points were also mentioned in the feast (V. 23, p. 1585). The rivers and lakes referred to as being places in Gisdaywa territory owned by Gisdaywa are fishing places where members of the House of Kaiyexweniits fish, (V. 33, p. 2105).

Mr. Joseph was cross-examined about the boundaries spoken of by him in his evidence. Despite the suggestion, there were no contradictions between the boundaries as described and the way that the boundaries were described at the All Clans Feast in Moricetown in April, 1986, (V. 36, p. 2337). When asked whether or not the people from Sarah Layton's (Knedebeas') House would have a right to come up to Peter Alec Creek, Alfred testified that they could not because they would stay on the other side of the ridge (V. 37, p. 2391).

Mr. Joseph was asked in cross-examination about traditional claims of ownership and jurisdiction and it was suggested that they were limited to hunting and trapping. To this, he replied:

> "When they (the people from his House) talk of their land they also put in the word Wa Ts'a Id'egh, which means "everything that came from the territory."
>
> A. Joseph, V. 38, pp. 2510-11

Mr. Joseph pointed out in cross, that Morice Mountain (in the North East) is the boundary between Gisdaywa and Kanoots (Madeek), part of it in Gisdaywa's territory and part of it in Kanoots'. (V. 41, p. 2680).

Mr. Joseph explained the reasons for the difference between the interrogatory map description and his territorial description. He stated that he had come by further knowledge which helped him to further clarify certain points of the boundary. He had discussed this with Andy and Leonard George and came to a clearer understanding of the boundary at certain places along the description. (V. 24, pp. 1594-97).

### (g) Decisions About the Territory

Management decisions are made about use of the territory by the House members. Decisions are made within the House by the members themselves outside of the feast and then announced at the next feast (V. 33, p. 2139). The House members meet about whatever is happening on the territory. Alfred consults with his uncles for advice. With this advice the Chief decides who goes on to the territory (V. 34, pp. 2195-97). Because the Chief of a House has the authority to determine who has access to the territory, Gisdaywa has exercised that authority to permit others to use his territory. A case in point is his having authorized Leonard and Andy George to continue to trap on the territory (V.23, p. 1526 and V. 34, p. 2226). One of the cousins he authorized to trap on the territory, Jimmy George, died on the territory (V. 23, p. 1526).

### (h) Resources From the Territory

Alfred described the extensive presence of members of his House and others with permission on the territory. In the past, Gisdaywa lived at the mouth of Owen Creek as his home place, or he had a camp wherever he went every winter and spring to trap for beaver (V. 34, p. 2219).

There was also a berry site at Morice Mountain where members of the House of Kaiyexweniits harvested berries:

> "Any place there was a burn, they become berry sites. Berry sites on Gisdaywa's territory were not common sites, but were Gisdaywa's berry sites."
>
> A. Joseph, V. 33, pp. 2158-60

The berries from Gisdaywa's territory have also been used in trade with other nations. They traded berries with the Nishga for oolichan. They traded as well for seaweed, herring eggs, abalone shells and dried clams. And this trading practice continues to the present day. Mr. Joseph testified that abalone shells are used for jewellery or inlay on different carvings, the oolichan grease is used as food and they mix it with berries, with vegetable or meat. (V. 23, p. 1557). Skunk cabbage is also taken from the territory and traded. It is used in the tieing and rolling of soapberry cakes. The Wet'suwet'en trade for yellow cedar for use in making special carvings.

A. Joseph, V. 23, p. 1559

Willy George hunts on Gisdaywa's territory and gives meat from the territory to Alfred. He also provides meat to Sylvester George and Joseph George, his uncles. In the spring, he gets dry beaver meat which is also given to his uncle. Sylvester George is not able to work so they make sure he gets things off the land which he would need to use. Alfred also receives these things from Andy and Leonard George.

V. 23, p. 1526

Alfred ensures that conservation practices are utilized by those using the territory by always moving to a different place to hunt or trap:

> "You don't use one area like all winter. You go into one valley and you use that for awhile and then you move to another area."
>
> A. Joseph, V. 23, p. 1528

Alfred described the different places on the territory where members of the House had cabins in the past and where there are presently cabins located. For example, there is a trapping cabin located at Xeet Yex on the trail from Parrott Lake to Owen Lake (V. 23, p. 1583).

There was a House at Biiwenii C'eek used by the former Gisdaywa and it was also known as a gathering place of the Wet'suwet'en people. It was a winter village. Alfred's grandfather, Joseph Nachloch, trapped there and Thomas George lived there. This was known as the last place the trappers met before leaving to the various hunting and trapping territories to the southwest and south. (V. 33, p. 2153).

On cross, in response to the question, "What activities do your House members carry on in the territory with his permission?" Alfred said:

> "There are people from my House that are on there hunting, fishing or trapping."
>
> A. Joseph, V.34, p. 2212

It was suggested to Mr. Joseph that the territory as defined in Exhibit 62 was 315 square miles and that Gisdaywa's House only used 40 square miles. But Mr. Joseph explained on re-examination:

> "The valleys and the lakes are used for fishing year round . . . our people go hunting, berry picking in the summer, gathering material, putting up fish and gathering material to make snares, ropes . . . and for trapping."
>
> A. Joseph, V. 39, pp. 2559-2560

He went on to say that the mountains are used for hunting groundhogs and goats. The plateau is used for berries and gathering food that grow on the summit. Apart from the part of territory that's not comprised in the valley, lakes, plateaus and mountains are used. The meadows and open areas are used by members of his House (V. 39, p. 2560).

Mr. Joseph's evidence shows a long connection of the Chiefs and members of his House and the ancestors of those Chiefs to the land and territory at Bewenii Ben. It is evidenced in the crests, kungax and songs of the House. It has been passed along the matriline from past generations to Mr. Joseph. There is historical and contemporary management and harvesting of the resources on the territory. Mr. Joseph spoke to the many words in Wet'suwet'en referring to ownership of land, trespass and boundary. These were old words and clearly indicate the long-standing ownership of his and the other Wet'suwet'en House territories.

A. Joseph, V. 23, pp. 1571 - 1572

The evidence about the territory at Owen Lake illustrates that exclusive possession is in Gisdaywa's House, that the boundaries are capable of definition, that the boundaries were known by place names for land features passed to the present chief through the feast and by on-the-ground description and that the transfer of the territory was legitimized and maintained through the feast, crests, poles and oral history of the House.

**(b) Canada's Written Summary.**

The northern boundary of this territory is approximately 25 miles south of Smithers. Owen Lake is located approximately 60 miles south of Smithers. Alfred Joseph described the territory during his evidence at trial. The Plaintiffs' submissions regarding this territory are found at pages 308 to 324 of Volume VI of their final argument.

### CONCLUSION 2.

This territory appears to have been abandoned by the Plaintiffs by 1940. There is little, if any, admissible evidence that the Plaintiffs used this territory for hunting or trapping after the 1930's. Furthermore, Mr. Joseph's evidence indicates that his family only claims to use a small fraction of the Gisdaywa territory depicted on Exhibit 646-9B. The Plaintiffs have not established that they continuously used this territory.

### EVIDENCE 3.

Historical documents show that Mr. Joseph's grandfather, Felix George, appeared before the McKenna-McBride Commission on May 25, 1915 (Exhibit 264B, pp. 48-50) requesting land for himself and his family. Originally, Felix George requested land in the Ootsa Lake area. This land was unavailable. As an alternative Lot 3417, Range 5 Coast District was constituted a reserve for Felix George. This lot is located on the north end of Owen Lake in the Gisdaywa territory. Historical documentation also indicates that Felix George had already applied to pre-empt this same lot (Exhibit 1204-2, p. 781, item29, pp. 823-24; Exhibit 1203-8, X-14, letter dated 27 March, 1923, p. 7). Felix George's son, Thomas George, Mr. Joseph's maternal uncle, also pre-empted land at Owen Lake, which he subsequently sold in 1937 (Exhibit 996-5). This is the first known and recorded presence of any ancestors of the Plaintiffs in this area. Mr. Joseph claimed to have no specific knowledge of this history and that it was not reflected in the crest, songs and traditions of the House of Gisdaywa (v. 35, pp. 2258-64).

**4.** During his cross-examination, Mr. Joseph acknowledged that the Felix George I.R. #7 reserve on the Bewenii Ben territory is currently allotted to the Broman Lake Band (v. 35, p. 2257). Mr. Joseph stated that to his knowledge there was only one person, Rita George, who was both a member of the House of Kaiyexweniits and the Broman Lake Band (v. 35, pp. 2268-69).

**5.** Mr. Joseph testified that he remembered being at Owen Lake as a child with his family. After 1931, however, his family moved to Hagwilget and did not return to Owen Lake (v. 23, p. 1539). Mr. Joseph made intermittent trips through (v. 23, pp. 1539, 1545, 1552-54). There is no evidence he hunted or trapped on this territory. Mr. Joseph's knowledge of the area has, by his own admission, been acquired largely from Andrew and Leonard George, sons of Thomas George, who he said use a trapline within the area (v. 23, pp. 1526-27, 1555; v. 33, pp. 2137-38; v. 36, pp. 2335-36). Mr. Joseph also said that there is always someone on the "territory". It is obvious however that much of Mr. Joseph's knowledge of hunting, trapping and fishing in the area is based on inadmissible hearsay.

**6.** With respect to berry-picking, Mr. Joseph testified that there were some berry-picking sites on the Owen Lake territory near Morice Mountain (v. 23, p. 1556; v. 33, pp. 2159-60). During cross-examination, however, he admitted that his grandmother, Cecilia George, picked berries around the village of New Hazelton. He further admitted that it was not necessarily travelling to the territory to pick berries that was important, but rather to go to an area where there had recently been a burn (v. 35, p. 2239).

**7.** Mr. Joseph's perspective about the size of this territory did not coincide with the area depicted on maps provided by the Plaintiffs which were marked as Exhibits 5 and 646-9B. Mr. Joseph was cross-examined about his territory as it was depicted on Exhibit 5 which at the time of his evidence provided the latest depiction of the "final" boundaries of his territory. The territory as mapped on Exhibit 5 is approximately the same size and shape as the mapping of the area on Exhibit 646-9B (compare Exhibits 1243-E and 1243-H on 1243). When asked the approximate size of the Bewenii Ben territory, in square miles, Mr. Joseph responded it was approximately 40 square miles in size. In cross-examination it was suggested to Mr. Joseph that this territory was 315 square miles in size. When this figure was put to Mr. Joseph he stated that this could be the total size, but that his House used approximately 40 square miles (v. 34, p. 2193). This evidence, taken in conjunction with later evidence regarding the speech made at the Moricetown all-clans feast by Leonard George suggests that the area used by the House of Gisdaywa is synonymous with the trapline registered by Leonard and Andrew George (v. 36, pp. 2335-44; v. 33, pp. 2137-39). This trapline is located in the southwest portion of the territory and comprises less than a quarter of its total area.

**8.** Mr. Joseph testified that there has been considerable logging and clear cutting on the Bewenii Ben territory, which has affected the ability to trap and destroyed trails (v. 23, pp. 1527-28; v. 25, pp. 1658-59; v. 39, pp. 2609-10).

**9.** Mr. Rae McIntyre, a former employee of the Department of Indian Affairs, who held the position of Superintendent of the Burns Lake sub-Agency during the late 1960's, testified that during his tenure with the Department of Indian Affairs, Felix George I.R. #7 was held by to the Omineca Band (v. 304, p. 23020). He testified that in the course of his duties he travelled to Owen Lake. He did not see any Indian people living on the reserve, nor any signs of old habitations (v. 304, p. 22975). He further testified that he never went to Owen Lake unless there was a lease application. He reiterated, "There was no one living there." (v. 304, pp. 23008, 23022). Mr. McIntyre was, however, aware that the reserve "was at one time a home site of an Indian person or persons and their families." (v. 304, p. 23021). This evidence undermines Mr. Joseph's assertion, as put forward in the Plaintiffs' argument, that there is ongoing use by the Plaintiffs of this territory.

## Part 5. Spookw, Stekyawdenhl (Roche de Boule) Territory

### (a) The Plaintiff's Written Summary.

Steve Robinson, as the head Summary of the House of Spookw, testified to this territory in his territorial affidavit, Exhibit 592. He was instructed about this territory by his father, Bob Robinson, and his mother, Molly Robinson. His father was from the House of Nikateen. He was also instructed about this territory by Mary Johnson, the former Yagosip and by Frank Clark, the former Spookw. All these Chiefs are now deceased. They pointed out the boundaries and major land marks while travelling on this territory with Mr. Robinson and they told him this territory belonged to Spookw. Mr. Robinson identified 17 **geographical features** on the Spookw territory by their Gitksan names.

There is a place within this territory known as Daxso'op which is a pond at the outlet of Seeley Lake. This belongs to the House of Wii Goob'l. This outlet pond is also known as Wii Gidii Sitax.

As to whether the ownership or boundary of Spookw's territory had changed, in cross-examination Mr. Robinson said:

> The maps can change, you see, you can draw a map here and they say cut it in half and then — but Spookw's territory has its own boundaries from the time that they were here. You see, this is what I mean, I'm going to explain to you . . . maps can change, but the territory itself stays, and we know.
>
> (V. 153, p. 9824, l. 15 - 29).

Mr. Robinson said that it was a mistake in Mr. N. J. Sterritt's note that the feature Lax An Daahlw (a berry area) belonged to Gyetm Galdoo. This note in Exhibit 808 was a mistake because this area belongs to Spookw (V. 153, p. 9830).

Mr. Robinson explained that the reason why Lost Lake is Yagosip is that it was claimed by Yagosip quite a few years "before our time" but the area around it belongs to Spookw. (V. 154, p. 9916).

Mr. Robinson made it clear in his testimony that Seeley Lake itself belonged to Spookw but that the outlet pond at the northeast end of the lake was owned by Gyetm Galdoo "because Gyetm Galdoo had a fishing site right in the mouth of — right at the mouth of Station Creek, coming out there." (p. 9839)

Mr. Robinson learned about Spookw's territory from his parents and the Chiefs of that territory still maintain it. And he learned a lot about it from the feast hall (V. 153, p. 9843). He said:

> There are people who are knowledgeable about these areas, and they pass it on because maybe one time or another in the past in some of the other areas that there — that are talked about in the feast hall. In the feast hall most of the stuff come up, and if I should stand up and claim an area, a territory that shouldn't be changed, and the witness in the feast hall would get up and he would say to me, Your Honour, "You are wrong", and I have to — have to step back from it, because one or two witnesses in the feast hall will say that I am wrong. (p. 9844).

When Mr. N. J. Sterritt wrote in his note of December 31, 1981 that "Spookw has no land", that was an error; "that's unintentional" said Mr. Robinson. This note was found in Exhibit 818 (V. 154, p. 9869) and was part of the process of Mr. Sterritt's early research to determine the names of the territories and the ownership of those territories.

Mr. Robinson also indicated that the claim to the Spookw territory is greater than what was indicated in the map attached to the interrogatory answers, Exhibit 335 (V. 154, p. 9862).

Mr. Mackenzie in cross suggested that the territories were a "re-creation, a creation that you prepared for the Court case. To this Mr. Robinson said:

> It's not a creation, its there and then we know what our land is. We didn't create — I'm not — I'm not a magician to create anything, to do anything like that — — — — but we are talking about land and all get together and then we were denied by the B.C. Government, they wouldn't recognize us as people of this country.

### (b) The Province's Written Summary.

**The Spookw claim area boundary on Map 9A is said to based upon the boundary description in Steven Robinson's territorial affidavit (Ex.592). (M. George, Tr.217, p.15768). There are several maps of this claim area prepared by the Plaintiffs that are inconsistent with Spookw boundaries and ownership shown on Map 9A as follows: Ex.335, Ex.336, Ex.102 and Ex.5. Exhibit 335 is Steven Robinson's response and Spookw claim area map in answer to Interrogatory 59(c). Exhibit 336 is another version of Ex.335 with some amendments. These exhibits show only a portion of the western half of the Map 9A area presently claimed by Spookw. Robinson stated in his response to Interrogatory No. 59(c) that the map showed the approximate boundaries of Spookw's claim area.**

Exhibit 335, however, is very inconsistent with Spookw boundaries on Map 9A. (S. Robinson, Tr.154, pp.9861-9866). Exhibit 102 shows three claim areas jointly claimed by Spookw and Yagosip. The boundaries and ownership of these claim areas are inconsistent with the Spookw boundaries and ownership shown on Map 9A. (S. Robinson, Tr.154, pp.9870-9872). Exhibit 102 and Ex.335 were prepared by M. George from Neil J. Sterritt's working map. Both maps reflect information in Mr. Sterritt's working maps, field notes and data sheets obtained by Mr. Sterritt from the hereditary chiefs. (M. George, Tr.216, p.15738). Exhibit 5 is also significantly inconsistent with Map 9A Spookw boundaries and ownership. Exhibit 5 was described by Plaintiffs' counsel on May 20, 1987 as showing the Plaintiffs' "internal boundaries". (M. McKenzie, Tr.7, p.410). Neil J. Sterritt's field notes indicate that on several occasions prior to the date of Robinson's territorial affidavit, Mr. Robinson and other informants provided to Mr. Sterritt information inconsistent with Spookw ownership and boundaries as described in Mr. Robinson's territorial affidavit and on Map 9A. (S. Robinson, Tr.153, pp.9824-9828). For example, Mr. Robinson told Mr. Sterritt that Dam Similoo, a lake southeast of Seeley Lake, was owned by Gytem Galdoo. (Tr.153, p.9826). Henry Wright told Mr. Sterritt on April 24, 1979 that Station Creek was owned by Gytem Galdoo. (S. Robinson, Tr.153, pp.9839-9841; Ex.810). David Green confirmed that Gytem Galdoo owned Station Creek. (Ex.595A, p.8).

Mr. Robinson further advised Mr. Sterritt that Spookw had once owned land in the Mosquito Flats area. (Tr.153, p.9820). David Green confirmed this. (Ex.595A, p.21). Mr. Robinson also is noted as having advised Mr. Sterritt that Yagosip and Spookw jointly owned the claim areas. (Tr.154, pp.9867-9868). All this information in Mr. Sterritt's notes is inconsistent with Spookw's present claims as indicated in Mr. Robinson's territorial affidavit and on Map 9A. Mr. Robinson's territorial affidavit identifies Seeley Lake as being in Spookw's claim area. Mr. Robinson testified that Spookw owns Seeley Lake. (S. Robinson, Tr.153, p.9836). In her commission evidence, Jessie Sterritt, the former Wii Goobl, testified that Wii Goobl owned Seeley Lake. (J. Sterritt, Ex.770B, pp.64-65). In the Wii Goobl response to interrogatory 59(c), Martha Ridsdale deposed that Seeley Lake was referred to as Wii Goobl's lake. (Ex.811, S. Robinson, Tr.153, pp.9837-9838). David Green, on the other hand, stated that Gytem Galdoo owns Seeley Lake. (Ex.595A, p.8). All this evidence about ownership of Seeley Lake by Houses other than Spookw is contrary to Mr. Robinson's territorial affidavit and Map 9A.

Mr. Robinson further advised Neil J. Sterritt in 1979 that Lost Lake was in Yagosip's claim area. Lost Lake is identified in Mr. Robinson's territorial affidavit (Ex.592), as being within the Spookw claim area. Mr. Robinson on cross-examination agreed that Yagosip owned Lost Lake. (S. Robinson, Tr.153, pp.9830-9835; Ex.809). This alleged ownership of Lost Lake by Yagosip contradicts Mr. Robinson's territorial affidavit and Map 9A. Cecilia George, the mother of Thomas George (the former Gisdaywa), had a registered trapline near Lost Lake within the Spookw territory. Mrs. George was a member of the Wet'suwet'en Gitdumden clan. (S. Robinson, Tr.153, pp.9833-9834; Ex.94D). That fact is inconsistent with Spookw's ownership of this claim area. Mr. Robinson is also noted by Neil Sterritt to have stated that Dam Similoo Lake and the berry picking area above Dam Similoo Lake are owned by Gytem Galdoo. (Ex.808). The Sterritt data sheet information conflicts with Mr. Robinson's territorial affidavit and Map 9A. (S. Robinson, Tr.153, pp.9824-9828; Ex.807; Tr.153, pp.9829-9830; Ex.808). There is much inconsistent evidence as to the ownership and boundaries of the Spookw claim area. Mr. Robinson's interrogatories map and the information which he provided to Neil Sterritt conflict with his territorial affidavit and Map 9A. There is much other evidence as well contradicting Map 9A Spookw ownership and boundaries. In view of these many serious inconsistencies, Mr. Robinson's territorial affidavit is unreliable. It follows that there is no reliable foundation and no reputation for the Spookw territorial boundaries and ownership as shown on Map 9A. The lack of reliable evidence and reputation as to the Spookw boundaries and ownership affects the boundary evidence for all claim areas which have common boundaries with this claim area. These claim areas on Map 9A include Nikateen, Yagosip — Nine Mile Mountain, Djogaslee (Axtii Dzeek), Gwis Gyen, Hanamuxw — Juniper Creek and Luutkudziiwus — Hazelton Creek. The final point should be made that the Spookw claim area is in the Gitksan heartland. This is not a remote wilderness claim area. The many serious inconsistencies as to Spookw claim area boundaries and ownership illustrate the lack of any settled reputation as to the location and ownership of this and all the Plaintiffs' claim areas.

### (c) Canada's Written Summary.

This territory is located about 3 miles south of the village of Hazelton. Major features of the territory include the Skeena River, the Bulkley River, and Roche de Boule Mountain. The territory is described in the affidavit of Steve Robinson (Exhibit 592, Section A). Jessie Sterritt and Alfred Joseph also gave some evidence about the territory. The Plaintiffs' submissions concerning the area are found at pages 178-25 to 178-28 of Volume VI of their final argument.

### CONCLUSION 2.

There is virtually no evidence of hunting or trapping on the territory and the Plaintiffs have not established that they used this territory for those purposes. There is evidence that "an outlet pond" at Seeley Lake was used for fishing at some undefined point in the past but that site appears to have been abandoned as a fishery or incorporated into a provincial park.

### EVIDENCE 3.

Jessie Sterritt stated that she used to go to Seeley Lake with Sam Hope and his daughter and they used a fish trap in the stream between the two lakes (Exhibit 70B, pp. 64-5). She also stated that there was a smokeHouse at the edge of the small lake (Exhibit 70B, p. 65). Mrs. Sterritt said that "all the people, Biiniks and Gyetem Galdoo" lived in that area in the fall while they fished and they also set traps at the foot of the mountain: "that is where Wii Goobl trapped" (Exhibit 70B, pp. 65-7).

**4.** There is no clear evidence as to the dates of the events that Mrs. Sterritt described. Two Sam Hopes appear on the Wii Gaak genealogy (Exhibit 591, p. 18). Exhibit 45A indicates that there is a provincial park at Seeley Lake which was established in 1956. In light of these facts, it is unlikely that the fish trap and smoke House which Jessie Sterritt describes were used for many years.

**5.** Steve Robinson does not appear to have hunted or trapped on this territory. He stated that as a boy he trapped with his father on Nikate'en's territory and since then has only trapped infrequently in and around the Gitanmaax Reserve (v. 154, p. 9904). He testified that he hunts occasionally but the areas he describes are nowhere near his territory (v. 154, pp. 9902-4).

**6.** Steve Robinson did however describe a berry picking place on his territory. He said that "we" pick berries at a place called Lax An Daahl Tse Yetswit on the mountain above the lake known as Dam Similo'o which is located on Lot 2384 in the southwestern part of the territory (v. 153, pp. 9828-30). There is no evidence of how frequently this site has been used.

**7.** Alfred Joseph testified that he knew that his grandmother Cecilia George, the wife of Felix George, had a trapline in the Hazelton area (v. 37, pp. 2398-9). Steve Robinson also testified that Cecilia George was given permission to use Lost Lake which is located in the eastern end of this territory (v. 153, pp. 9833-4). However, there is no evidence that this trapline was actually used.

## 30(A).YAGOSIP — MAX HLA GANDIT TERRITORY

### Part 6. Hagwilnegh, Keel Weniits, (McDonell Lake, Telka River).

### (a) Plaintiff's Written Summary.

This territory was testified to by John David in his territorial affidavit, Exhibit 665. Mr. David holds the Wet'suwet'en Chief name of Max Lax Lex and is a member of the House of Hagwilnegh, Laksilyu clan. Mr. David is over 90 years old having been born in 1896 (V. 156, p. 10020).

Mr. David is a senior hereditary chief among the Wet'suwet'en.

Mr. David was instructed about the Keel Weniits territory by his uncle the former Max Lax Lex, Old Sam, a member of the House of Hagwilnegh. He told Mr. David that the territory belongs to Hagwilnegh of the Laksilyu clan.

Mr. David described the Keel Weniits territory in his affidavit and he identified 54 geographical features on the boundary and within the territory by their Wet'suwet'en names. Among these features is a lake called Johnny David Lake on the map and in Wet'suwet'en he said was Neigii T'aat. Mr. David said his uncle had told him that the boundary of the territory had remained the same throughout his lifetime and since long before the arrival of Europeans and that the House of Hagwilnegh had owned, harvested and looked after the territory from generation to generation. He had heard this territory described in a feast.

When cross-examined about the English names referred to in his affidavit, Mr. David said:

> Yes I told them place names and landmarks and they in turn told me the miles, approximate miles. I told them about the landmarks where I had been on the territory.

He then went on to say about the affidavit:

> It was — all my words were put on this paper.
>
> (V. 156, p. 10000).

As to the ownership of the territory, Mr. David described the Houses of Wah Tah Kwets and Wah Tah K'eght as being two other Houses, in addition to the House of Hagwilnegh, in the Laksilyu clan. Mr. David described the territory as being his clan's territory. He said that a long time ago the territory belonged to him and the previous Max Lax Lex and when he passed on the territory was passed on to him. Mr. David said further:

> It's a long time ago, Hagwilnegh and them were as a company, took care of that territory, and then I am — I am a caretaker and I look after it now as a successor to the deceased people
>
> (V. 156, p. 10002)

Mr. David said that Wah Tah Kwets of his clan holds that territory within the Keel Waniits territory from McDonell Lake to Beaver Creek. Dennis Lake belongs to all the Keel Waniits people (p. 10003-4).

In respect of the boundary of the Keel Waniits territory Mr. David said "that the old traditional boundary line was about a mile or two miles down river, that was the old traditional boundary line." (p. 10005). Mr. David's affidavit placed the boundary at Pine Creek, but about this Mr. David said:

> They use Pine Creek as a boundary line these days but the traditional boundary line is just a bit down river, a long time ago. A long time ago that peak wasn't the boundary. There is a place called Four Mile Hill up and Old Sam, long time ago, told me not to go beyond that and because I trapped in there a long time ago was when he told me that. And that's where the line goes.
>
> (V. 156, p.10006)

The evidence discloses that in more recent times the boundary was set by his House and clan at Pine Creek.

### (b) The Province's Written Summary.

The boundaries of the Hagwilnegh claim area at McDonell Lake shown on Map 9B are said to based upon the territorial affidavit of Johnny David. (M. George, Tr.217, pp.15788-15790). On Map 9B Hagwilnegh claims a large area extending from north of McDonell Lake south across the Telkwa River to Howson Creek. There is much inconsistent evidence as to the ownership and boundaries of this claim area near McDonell Lake. On the basis of this inconsistent evidence, it is submitted that no "settled" reputation has been established for the ownership and boundaries of this claim area as depicted on Map 9B. Several witnesses testified that the House of Wah Tah Kwets owns this claim area. Lucy Bazil, a member of Wah Tah Kwets, testified that McDonell Lake was in Wah Tah Kwets' claim area. (L. Bazil, Ex.99, p.129) She said that several members of the House had a registered trapline at McDonell Lake. (L. Bazil, Ex.99, p.156).

Pat Namox, another member of Wah Tah Kwets, testified that McDonell Lake was in Wah Tah Kwets' claim area. (P. Namox, Ex.672A, p.4). John Namox, Chief Wah Tah Kwets, swore an Affidavit attaching interrogatories answers referring to an attached map covering the McDonell Lake area. He stated in Interrogatory answer 59(c) that the map showed the approximate boundaries of Wah Tah Kwets' claim area. (Ex.828, 828A). The map also includes Dennis Lake within the territorial boundaries. The Namox interrogatories map was prepared by Marvin George. (M. George, Tr.216, p.15742). John Namox swore an Affidavit deposing that the information set out in the interrogatories answers was true. The attached map represented his best personal knowledge of the location of Wah Tah Kwets' claim area at McDonell and Dennis Lakes. The evidence of Pat Namox, John Namox and Lucy Bazil conflicts with Johnny David's territorial affidavit and Map 9B. Johnny David did agree that John Namox owned the area around Beaver Creek near McDonell Lake. (J. David, Tr.156, p.45) That evidence conflicts with David's territorial affidavit and Map 9B. Hagwilnegh's interrogatories response to Question 59(c) does not mention McDonell Lake or the Keel Weniits claim area. (Ex.243) The present Hagwilnegh area on Map 9B consists of three areas depicted as separate claim areas on Ex.5 as follows: Wah Tah Kwets — McDonell Lake, Hagwilnegh (Skokumwasas) — Telkwa River and Wah Tah Kwets (K'hay La'h) — Howson Creek. Exhibit 5, on which certain claim areas were identified as correct by Mary McKenzie and Mary Johnson, is inconsistent with Johnny David's territorial affidavit and Map 9B. In his testimony, Alfred Joseph (Gisdaywa) stated that Wah Tah Kwets owned the claim area adjoining the northwest boundary of the Gisdaywa claim area. (A. Joseph, Tr.23, p.1587). That was in accordance with Ex.5. That area to the northwest is the Howson Creek territory now claimed on Map 9B by Hagwilnegh. Alfred Joseph's evidence therefore is inconsistent with Johnny David's territorial affidavit and Map 9B.

On Ex.102 (Ex.646-4), the McDonell Lake area is attributed to Wah Tah Keght with boundaries similar to those in John Namox' interrogatories map, Ex.828A. Exhibit 102 has the area around Moricetown now claimed on Map 9B by Wah Tah Keght attributed to Wah Tah Kwets. The Howson Creek area on Ex.102 is attributed to Wah Tah Kwets — Kaylah. Exhibit 102 was prepared by Marvin George in October 1985 on the basis of researchers' working maps, field notes and data sheets. The information was obtained from the hereditary chiefs. (M. George, Tr.216, p.15738). Exhibit 102 is inconsistent with Johnny David's territorial affidavit and Map 9B. On Ex.101 also, the McDonell Lake area is attributed to Wah Tah Kwets. The Wet'suwet'en chiefs displayed Ex.101 as a depiction of their claim areas at the Moricetown All Clans Feast with Carrier Sekani chiefs on April 6, 1986. Johnny David and John Namox were prominent participants in that All Clans Feast. Exhibit 101 is inconsistent with Johnny David's territorial affidavit and Map 9B. Trapline ATN 0609T037 is located southwest and west of McDonell Lake. The trapline is registered to Jean (John) Namox. It is now held by Pat Namox. Pat Namox testified that he continues to hunt and trap in this territory. (P. Namox, Ex.672A, p.6, 7, 11). That evidence corroborates the evidence that part of this area was claimed until recently by the House of Wah Tah Kwets contrary to Johnny David's territorial affidavit and Map 9B. In conclusion, until at least 1989 when Map 9B was produced, the Plaintiffs regarded McDonell Lake as being within the claim area of Wah Tah Kwets. The Howson Lake area was also thought to be within Wah Tah Kwets' claim area. This is inconsistent with the claim area boundaries and ownership in Johnny David's territorial affidavit and on Map 9B. It is submitted, therefore, that there is no reliable basis in the evidence for reputation as to boundaries and ownership of the McDonell Lake area or the entire Hagwilnegh claim area as indicated on Map 9B. The unreliability of the evidence for the ownership and boundaries of the Hagwilnegh claim area adversely affects all the neighbouring claim areas, namely Duubixsw, Wah Tah Keght, Woos, Gisdaywa, Knedebeas and Kweese.

### (c) Canada's Written Summary.

The eastern boundary of this territory is located approximately 5 miles west of Smithers. McDonell Lake, Dennis Lake and the Telkwa River are important topographical features of the territory. McDonell Lake is approximately 10 miles northwest of Smithers. Johnny David described the area in his affidavit (Exhibit 665, Section C). Pat Namox and Lucy Bazil also gave evidence about the McDonell Lake-Dennis Lake area. The Plaintiffs' submissions on this territory are at Volume VI, pages 422-424.

**CONCLUSION 2.**

The Plaintiffs have not established that they have consistently used this territory, especially in the last few decades. Lucy Bazil's evidence of use, we submit, is inadmissible hearsay. John and Pat Namox have not consistently used the territory. Indeed, it is only within the last two years that Pat Namox has gone to the area. There is insufficient evidence for the Court to make a finding of aboriginal rights to this territory.

**EVIDENCE 3.**

In his commission evidence, Johnny David testified that people from Moricetown and Hagwilget hunted in the Kilwoneets-Telkwa river area. He identified Old Sam, Old Dennis, Joe Nass and Thomas, Julia, Basil and David Holland as people who used the area (Exhibit 74A, pp. 6-7). From the Hagwilnegh genealogy (Exhibit 1067), approximate dates of birth can be obtained: Old Sam — @1855; Old Dennis — unknown; Joe Nass — @1886, Thomas Holland — @1876, died 1924; Julia Holland — not found; Basil Holland — @1881; David Holland — not found. Mr. David described these people as Kilwoneetzen — people of Kilwoneets.

**4.** Johnny David testified that there was fishing in McDonell Lake. It was not exclusively Wet'suwet'en fishing; Gitksan people also fished there (Exhibit 74H, pp. 50, 52; Exhibit 74C, p. 48-49). In addition to salmon, the people fished for trout and dolly varden (Exhibit 74H, p. 63). He stated that some people still fish there, although he did not say who (Exhibit 74H, p. 64).

**5.** Mr. David also said that huckleberries were picked in the area (Exhibit 74H, pp. 64-65).

**6.** Lucy Bazil testified that her uncles Jack Joseph and Pat Joseph "used" and held the territory at McDonell Lake (Exhibit 99, pp. 16-17). Mrs. Bazil said that her first husband, Frank Basil, trapped on this territory for her (Exhibit 99, pp. 72-73). She also testified that George Joseph, brother to Jack and Pat, had a trapline at McDonell Lake (Exhibit 99, pp. 110-111). Mrs. Bazil's son, Roger, was a member of the trapline at McDonell Lake, and she stated that both Pat Namox [a.k.a. Jean Baptiste Namox (Exhibit 672A, p. 12)] and John Namox went out to the area (Exhibit 99, pp. 156, 72). There is no evidence however that Mrs. Bazil was ever on the territory. This testimony therefore is almost certainly based on hearsay and is inadmissible.

**7.** Pat Namox testified that he had trapped out in the McDonell Lake area in 1987 and 1988 (Exhibit 672A, p. 6). He further testified that he had hunted around the McDonell Lake area for moose, although he did not say when (Exhibit 672A, p. 7).

### Part 7. Samooh, Tsee Cul Tes Dieez Ben (Tahtsa Lake) Territory

#### (a) Plaintiff's Written Summary.

Elizabeth Jack testified to this territory in her territorial affidavit, Exhibit 666. The territory is located south of Morice Lake a hundred miles southwest of the village of Moricetown.

Mrs. Jack was instructed about this territory by her father, Batise Louie and her uncle, the former Chief Louie, who is a member of the House of Kloum Khun. Both are now deceased. Chief Louie pointed out the boundary and major landmarks on this territory when Mrs. Jack travelled with him there.

Mrs. Jack was born at Ootsa Lake, but was raised at Cheslatta. Mrs. Jack was shown a map of the Tahtsa Lake territory by Marvin George and the boundaries on that map correctly showed the territory (Exhibit 666-A, p. 4).

In her cross-examination Mrs. Jack testified that Chief Louie was a member of the House of Kloum Khun and a member of the Tsayu Clan (p.5, l. 3 - 12). She testified that she always went with her father to the Tahtsa Lake territory to do their hunting: "I was raised on there and we always go down there". (p. 6) She hunted with both her father and Chief Louie. She travelled with Keom Morris, a Wet'suwet'en, on the territory as well.

Mrs. Jack testified that Chief Louie and her father were Cheslatta people and not Wet'suwet'en (p. 10). She discussed with Marvin George about the Tahtsa Lake territory belonging to a Wet'suwet'en Chief, but she did not know who the territory belonged to. (Exhibit 666-A, p. 12, 1. 41 - 45).

Mr. Johnny David gave evidence that the Tahtsa Lake territory was owned by Samooh. Mr. David was cross-examined on his territorial Affidavit, Ex. 665, on December 1, 1988: Vol. 156, p. 9998. During that examination it was pointed out to him that he referred to the fact that "the affidavit of Elizabeth Jack (Ex. 666) sworn on July 19th, 1988 was read to him . . ." despite the fact that he swore his affidavit 6 days earlier on July 13th. As a result, the Court indicated that it would disregard the sentence containing the reference to the date on which the affidavit was read to him: Vol. 156, p. 9999, ll. 7 - 9.

Mr. David's affidavit continued:

> "The territory known as Tsee Cul Tes Dleez Ben (Tahtsa Lake-Samooh) is Wet'suwet'en territory. I knew Chief Louie. He informed me that this territory belongs to Samooh, and has belonged to him since long before the arrival of Europeans."
>
> Ex. 665, para. 32

On re-examination Mr. David said the following:

> Q. The day that the woman lawyer came to your House to sign the affidavit with Victor Jim who translated, do you remember one other affidavit being read to you besides yours?
>
> A. Yes, I remember that.
>
> Q. Do you know a woman named Elizabeth Jack?
>
> A. Yes, I know her.
>
> Q. Was it her affidavit which was read to you?
>
> A. Yes.
>
> J. David, Vol. 156, p. 10015

The evidence is clear: Samooh owns the territory at Tahtsa Lake.

No other questions were asked of Mr. David either in cross-examination or in re-examination concerning his statement that the Tsee Cul Tes Dleez Ben (Tahtsa Lake) territory was owned by Samooh.

In spite of this, the Province argues that a previous commission statement to the effect that half of Sebola Mountain (outside of Tahtsa Lake territory) belonged to Chief Louie, Ex. 74E — p. 525; ll. 1-8, January 30th, 1986 was a previous inconsistent statement and therefore his evidence on December 1st, 1988 should not be given any weight.

The difficulty with this argument is that Mr. David was never cross-examined about the territorial ownership of the Tahtsa territory, let alone about previous statements made about Chief Louie. To impeach his evidence on the affidavit, he would have to be examined directly on the alleged inconsistency.

Mr. David identified Chief Louie, now deceased, himself as the source of the reputation that the territory is Wet'suwet'en belonging to Samooh.

This evidence is confirmed by the uncontradicted and unchallenged evidence of Jimmy Morris and Stanley Morris who testified to the ownership of the territory at Nanika Lake, to the North of Tahtsa Lake: Ex. 669-1. Mr. Morris said that the territory to the South was owned by the Gilsehya, Frog, which is the clan of Samooh: Ex. 669, para. 13. There is no claim by Goohlaht of the Gilsehya to the territory there.

**(b) Province's Written Summary.**

The Samooh-Tahtsa Lake territory is located in the southwest corner of the claim area. It includes Tahtsa Lake and Troitsa Lake. The boundaries of this territory appear on map 9B.

Marvin George stated that he relied upon the affidavit of Elizabeth Jack (Ex.666) to draw the boundaries of this territory (Tr.218, p.15864, 1.42 to p.15865, 1.3). There is conflicting evidence about the ownership about this territory and whether it should be included in the Claim Area. Evidence. Elizabeth Jack Affidavit. In her affidavit, Elizabeth Jack, a Cheslatta person, deposes that she was instructed about the territory by her father, Batise Louie and her uncle, Chief Louie. The affidavit, paragraph 4 contains a detailed metes and bounds description of the boundary and paragraph 5 refers to geographical features on the territory. The affidavit says nothing about ownership about the territory. Johnny David Affidavit. In Johnny David's affidavit, Ex.665, sworn July 13, 1988, he refers to this territory in paragraph 32 as follows: "I have had translated to me the affidavit of Elizabeth Jack sworn on July 19, 1988. The territory known as Tsee Cul Tes Dleez Ben is Wet'suwet'en territory. I knew Chief Louie. He informed me that this territory belongs to Samooh, and has belonged to him since long before the arrival of the Europeans." Johnny David Cross-Examination. Reference was made to paragraph 32 of Ex.665 at the time that Johnny David was cross-examined on his affidavit on December 1, 1988. Mr. David could not explain how he could have translated to him an affidavit on July 19, 1988 after the date he swore his own affidavit, July 13, 1988. In reference to this conflict, the Court stated: "I would think the way it stands I would have to disregard that sentence of this affidavit but that's as far as it would take us." Tr.156, p.9999. ll.7-9.

That would leave the last two sentences of paragraph 32 intact constituting apparent evidence to support the attribution of territory ownership to Samooh. Elizabeth Jack Cross-Examination. On the cross-examination on her affidavit, Elizabeth Jack agreed that this was Chief Louie's territory and that if someone else wished to trap there, they would have to ask for Chief Louie's permission. She also agreed that Chief Louie and Elizabeth Jack's father, Batise Louie, were Cheslatta Indians (Ex.666A, p.9, 1.47 to p.10, 1.17). Mrs. Jack's re-examination reads as follows:

> "Q: Now, you were asked a question about the Tahtsa Lake territory and you were asked whether that was Chief Louie's territory and you said that it was. My question is: Was that Chief Louie's territory because he had a government registered trapline there or was it Chief Louie's territory because it was his traditional Indian territory?
>
> A: They own territory in Indian way." Ex.666A, p.13, 1.44 to p.14, 1.4.

The only evidence that the territory belonged to Samooh, therefore, is paragraph 32 of the David affidavit. This should be accorded no weight because Johnny David's earlier testimony contradicts paragraph 32. Johnny David Commission. In his commission evidence, Johnny David agreed that Chief Louie was from Cheslatta (Ex.74E, p.5-23, ll.7-13; p.5-25, ll.24-25; Ex.74G, p.7-91, ll.14-15). He said further that half of Sebola Mountain belonged to Chief Louie. (Ex.74E, p.5-24, 1.47 to p.5-25, 1.2). On map 9B, Sebola Mountain is not within or on the Tahtsa Lake territory boundaries. It is well within the Goohlaht territory to the east of the Tahtsa Lake area. It is submitted that David's statement is consistent with the exclusion of this area from the Wet'suwet'en claim area on Ex.113 (1977) approved by the Wet'suwet'en chiefs in October 1977. David's statement is not consistent with map 9B boundaries in the southwestern region of the Wet'suwet'en claim area.

David said that the only name he knew on the Nutsenii side of the boundary was Big Louie (Ex.74E, p.5-30, ll.37-40). Johnny David's examination-in-chief continued:

> "Q: Was Chief Louie Nutseni?
>
> A: Yes.
>
> Q: Was he the Nutseni chief whose territory bordered on the Wet'suwet'en territory?
>
> A: Yes, he was . . .

> Q: Is Sebola Mountain on the boundary between the Wet'suwet'en people and the Nutseni people?
>
> A: The Sebola Mountain half is Wet'suwet'en territory and half is Nutseni territory . . ." Ex.74E, p.5-25, ll.35-45

This evidence is also consistent with Ex.113 and inconsistent with map 9B.

Further in his examination-in-chief, Johnny David spoke about Skin Dyee's territory at Skins Lake. The examination-in-chief relating to this territory was as follows:

> "Q: Earlier this morning or just a few moments ago we were talking about Skin Dyee's territory, is that the same as Samooh's territory or is it different?
>
> A: Yes, it is the territory of Samooh.
>
> Q: Does Samooh also have other territories?
>
> A: No." Ex.74E, p.5-33, ll.25-30

That evidence is inconsistent with the alleged claim by Samooh to the Tahtsa Lake area. According to David's evidence, therefore, Samooh had only one territory, that claimed by Skin Dyee at Skins Lake. Moses David, Johnny David's son, also held the name Samooh (Ex.74E, p.5-31, ll.3-6). Chief Louie's territory, furthermore, was outside the Wet'suwet'en boundaries. Neil Sterritt. Sterritt testified that he drew the boundary on Ex.113 on the basis of information received from the Wet'suwet'en hereditary chiefs (Tr.113, p.7088, 1.43 to p.7089, 1.13). He had meetings with the Carrier chiefs in October 1977 in Moricetown at which time they defined the Wet'suwet'en boundaries (Tr.113, p.7089, ll.29-38; Tr.115, p.7233, ll.5-15). Exhibit 113 does not include the Tahtsa Lake territory.

Sterritt testified further that, among the 15 chiefs present at the Moricetown meeting in October 1977, were Johnny David and his son, Moses David, who at that time held the title Samooh (Tr.113, p.7089, 1.41 to p.7090, 1.1). Johnny David was also present when the map, Ex.113, was presented to the federal Minister of Indian Affairs at a special ceremony at Kispiox in November 1977 (Tr.113, p.7084, 1.4 to p.7085, 1.4; p.7086, 1.3).

Sterritt later referred to the difference between Ex.113 (1977) and Ex.648 (1984) with respect to the southern boundaries of the land claim area. He stated that the southern boundary had been extended to include, among other areas, Tahtsa Lake, as a result of field trips that Alfred Joseph made to that area (Tr.115, p.7257, ll.36-42).

Marvin George. George identified Ex.1003 as Leonard George's working map (Tr.216, p.15708, 1.24 to p.15709, 1.30). The name "Chief Louie" was written in the Tahtsa Lake area when Marvin George received Ex.1003. The boundary in the Sibola Mountain area on Ex.1003 which George transferred to Ex.101 and Ex.102, differs from map 9B boundaries for the Tahtsa Lake area. Ex.1003, Ex.101, Ex.102 include part of Sibola Mountain in the claim area, whereas map 9B excludes that mountain. Exhibit 1003, Ex.101 and Ex.102 are consistent with Johnny David's commission evidence in this respect. map 9B is inconsistent with the David evidence. George stated that the source of the information for the maps he prepared was the Leonard George and Alfred Joseph data sheets. That information came originally from interviews with the hereditary chiefs (Tr.216, p.15714, 1.21 to p.15715, 1.37). For the Tahtsa Lake territory, Leonard George's land use reference data sheet indicates ownership by Chief Louie (Ex.998-3, p.9, No.24; Tr.216, p.15694, 1.4 to p.15695, 1.32). The number 24 corresponding to this entry on the data sheet also appears on Tahtsa Lake on Leonard George's working map, Ex.1003. That is inconsistent with Samooh's claim to the territory. Leonard George also recorded that the south side of Sibola Mountain was the territory of Chief Louie. His informants were Moses David (Samooh) on September 9, 1982 and Johnny David on March 17, 1983 (Ex.998-3, pp.14-15). That is inconsistent with Samooh's claim to Tahtsa Lake and with map 9B. Leonard George recorded that Steve Morris advised him on April 6, 1983 that the south half of Ndeh'da teste, between Nanika and Tahtsa Lake, was the territory of the Tsayu (Ex.998-3, p.16). On the Land Use Reference Data sheet, George recorded Sibola or Ndeh'da teste as a mountain owned by Chief Louie (Ex.998-3, p.10, No.48). On George's working map, this information is reflected by Number 48 in the Sibola Range north of Tahtsa Lake

(Ex.1003) (Tr.216, p.15708, ll.24-37). This information is inconsistent with Samooh's (Frog clan) claim to the Tahtsa Lake territory. Leonard George recorded that Steve Morris advised him on April 6, 1983 that Tahtsa Lake was in the territory of Chief Louie (Ex.998-3, p.55). That is inconsistent with Samooh's claim to the Tahtsa Lake territory. Marvin George agreed that Elizabeth Jack's affidavit does not state that this is Samooh's territory (Tr.218, p.15866, ll.43-46). He agreed further that the area had been identified as owned by Chief Louie in the map of April 1986, Ex.101 (Tr.218, p.15867, ll.2-12). Exhibit 102 (October 1985) had the same external boundaries as Ex.101 and also identified this as Chief Louie's territory. Ex.101 was used by the Wet'suwet'en chiefs to explain the Wet'suwet'en boundaries at the All Clans Feast with the Carrier-Sekani chiefs at Moricetown in April 1986. Johnny David was a prominent participant in this feast (Ex.82, pp.2, 3, 25-27). In response to Elizabeth Jack's sworn testimony that Chief Louie owned the area in the Indian way, Marvin George made several references to notes of his interviews with Jack and Michael Charlie (Tr.218, p.15867, ll.21-36). However, he agreed that these notes had all been taken before Elizabeth Jack swore her affidavit and before she was cross-examined on her affidavit (Tr.218, p.15867, ll.37-42).

Marvin George stated that Elizabeth Jack had told him on one occasion that Chief Louie owned the territory and on another occasion that she did not know who owned the territory (Tr.218, p.15870, ll.22-37). Marvin George then stated:

> "So I have this information, and I have information based on sworn affidavits, and it's information from the sworn affidavits that I used to identify that area as being Samooh." Tr.218, p.15870, ll.44-47.

When asked whether he had ignored Elizabeth Jack's sworn testimony, Marvin George said there were contradictions between what Elizabeth Jack was saying, what she had told him when she had first met with him and with other affidavits. Marvin George denied that he had exercised judgment in selecting evidence. He stated that "there was no judgment call and no need for a judgment call. It's identified in the affidavits of what territory it is." (Tr.218, p.15871, ll.1-11). It is submitted that George chose the evidence which supported the Wet'suwet'en claim. He clearly ignored Leonard George's data sheets and working map information on Sibola Mountain and Tahtsa Lake. George interviewed Michael Charlie, a Cheslatta Indian, on July 6, 1988. Charlie is said to have stated that the area was Wet'suwet'en. However, Charlie did not swear an affidavit (Tr.218, p.15871, ll.16-39). George noted that Jimmy Morris, a member of the Gitdumden clan, said that the area to the south of his territory at Morice Lake was Gilserhyu (Frog Clan) (Tr.218, p.15871, 1.40 to p.15872, 1.4). Chief Louie was Tsayu (Beaver Clan) according to Elizabeth Jack (Ex.666A, p.5, ll.7-8) and Johnny David (Ex.74E, p.5-24, ll.9-11). As to the identification of the territory on Ex.101, George testified as follows:

> "Q: . . . [I]t was identified as Chief Louie by you in Exhibit 101?
>
> A: Because that's the information that I had, yes.
>
> Q: Yes.
>
> A: I told you that the information that I had based on the research that was provided to me is information that went on those maps." Tr.218, p.15872, ll.19-25.

George was referring to the information obtained by Leonard George and Alfred Joseph and noted in their data sheets and working maps.

George referred also to the questions he had in his notes as follows:

> "A: I had developed this set of questions based on information that was provided to me, the contradictions that identified the ownership of that particular territory." Tr.218, p.15873, ll.4-7.

George's notes stated that Johnny David says Chief Louie's wife was from the House of Samooh (Tr.218, p.15872, ll.8-9). George interviewed Michael Charlie on May 12, 1988 (Ex.998-51). That meeting took place before George's interview with Elizabeth Jack and before her affidavit was sworn. Charlie told George that Chief Louie was Cheslatta, Tsayu clan, and that Chief Louie's wife was also Cheslatta (Tr.218, p.15874, ll.6-40). At the end of his notes on his interview with Charlie, Marvin George wrote:

> "This trip has only left us with more unanswered questions" (Ex.998-51).

At Ex.998-21, p.2 is a note in Peter Grant's handwriting stating that Johnny David says that the territory is owned by Samooh (Tr.218, p.15876, ll.14-18). George testified that this was the information on which he relied when plotting this territory:

> "Q: . . . And so it's Johnny David that says that it's Samooh's territory?
>
> A: Uh-huh.
>
> Q: And this is the information that you relied on in plotting it on 646-9B as Samooh territory?
>
> A: The information is in the affidavit of Johnny David. That's the information that I relied on and identified and labelled that territory as being the territory of Samooh." Tr.218, p.18576, ll.36-44.

George stated further on this point:

> "Q: And it's that note [re Johnny David] that you rely on in contrast to the sworn testimony?
>
> A: It's the affidavit that I rely on which described that area being Samooh." Tr.218, p.15877, ll.42-45.

George said also that he relied on the information in the affidavits in preference to the chiefs' statements in his notes when the two sources were in conflict:

> "Q: But you will agree with me this far, won't you, that when you have an interview note with a hereditary chief about his territory and that interview note conflicts with an affidavit, the interview note is probably right?
>
> A: No, the affidavit is right." Tr.220, p.15993, ll.31-36.

### Conclusions

In conclusion, Elizabeth Jack's sworn testimony is that this territory was owned by Chief Louie, a Cheslatta chief of the Tsayu clan, in the Indian way. Johnny David, in his commission evidence, said that Chief Louie was a Cheslatta or Nutseni chief whose territories lay outside the Wet'suwet'en territories. He said also that the only area claimed by Samooh was the Skins Lake territory. Johnny David and his son, Moses David, who held the title Samooh, were among the chiefs who described to Neil Sterritt the boundaries of the Wet'suwet'en claim during the meeting in Moricetown in October 1977. Johnny David was present when the map, Ex.113, whose southwestern boundary excluded the Tahtsa Lake area, was presented to the Federal Minister of Indian Affairs. Johnny David also participated at the April 1986 All Clans Feast when Ex.101, indicating that this area was claimed by Chief Louie, was displayed to the Carrier-Sekani chiefs. The only basis for alleging that this territory belongs to Samooh is the last sentence in paragraph 32 of Johnny David's affidavit, Ex.665. The Court has ruled that the first sentence in that paragraph is to be disregarded due to its reference to an affidavit sworn after the date of Johnny David's affidavit. The second last sentence is consistent with David's earlier evidence. The last sentence conflicts with Johnny David's earlier sworn evidence on commission, with Leonard George's data sheets and working map (Ex.1003), and with the maps Ex.113, Ex.101 and Ex.102. Furthermore the last sentence should not be admitted as reputation evidence since it relates to a subject covered during Johnny David's commission. The evidence to which Marvin George refers in his notes of an interview with Michael Charlie is hearsay and is inadmissible. Charlie was a living Cheslatta informant who did not swear an affidavit. In any event Charlie did not know who owned the territory. Jimmy Morris' statement that the area to the south of his territory was Frog Clan should be accorded little weight when compared with the Jack evidence, Leonard George's data sheets and the David commission evidence. Furthermore, he does not say which House owned the territory so his evidence is of little assistance to the Plaintiffs in any event. The Court is left therefore with a conflict between Elizabeth Jack's sworn testimony on cross-examination and re-examination and the evidence in Johnny David's affidavit, paragraph 32, if it is admissible. In view of the serious conflict with David's earlier commission evidence, the last sentence in paragraph 32 of the David Affidavit, if admissible, should be accorded little or no weight. Elizabeth Jack's evidence should be preferred. She had personal contact with her uncle and father while living and trapping on the territory. The overwhelming weight of the evidence is that this territory is not Wet'suwet'en and must be excluded from the Claim Area. Alternatively, the evidence of ownership is so conflicting that it cannot be relied upon and therefore for that reason the territory must be excluded from the Claim Area, since there is no evidentiary basis for inclusion.

There is a conflict between the Claim Area boundaries as depicted on Ex.1003, Ex.101, Ex.102 on the one hand and Ex.646-9B on the other. Since Leonard George gathered the information on Ex.1003 from hereditary chiefs, according to Marvin George, there is no common reputation for these boundaries (Tr.216, p.15714, 1.21 to p.15715, 1.37). The exclusion of this territory calls into question not only certain portions of the external boundary in this area but also the boundaries of the allegedly adjoining territories. The fragile evidentiary basis for these boundaries is reputation, but there is no evidence of reputation for the whole community (if there is one) on both sides of these boundaries.

There is no evidence of reputation as to the location of these boundaries from communities on both sides of these lines. As the evidence stands, taken at its strongest, it relates only to fragments of one side of these boundaries.

Marvin George's interviews also reflect the unreliable character of much of this boundary evidence and show conflicting views, not a common reputation as to the ownership of this territory. His technique of preparing a "draft" map, and list of geographical features, based on other researchers's data and working maps, in advance of his interview with Elizabeth Jack, as well as with other affiants, illustrates the serious problems with his research techniques.

### (c) Canada's Written Summary.

This territory is located approximately 75 miles southwest of Smithers. The main topographical feature on the territory is Tahtsa Lake. The territory is on the southwest corner of the claim area. Elizabeth Jack swore a territorial affidavit on this territory (Exhibit 666). Johnny David also referred to the area. The Plaintiffs submissions on this territory appear in Volume VI, pages 418-421.

### CONCLUSION 2.

There is no evidence that the Plaintiffs hunted or trapped on this territory. There is evidence that Cheslatta Indians used this territory. There is no evidence to support the Plaintiffs' claim of aboriginal rights to this territory.

### EVIDENCE 3.

Mrs. Jack is the daughter of Batise (a.k.a. Baptiste) Louie and a niece of Chief Louie (Exhibit 666A, p. 4). By her own admission, both her father and Chief Louie were Cheslatta Indians (Exhibit 666A, p. 10). Mrs. Jack is also Cheslatta (Exhibit 666, para. 1). She testified she was raised on the Tahtsa Lake territory, but had not been there since 1950-52 (Exhibit 666A, pp. 6, 10). Currently none of Mrs. Jack's children or grandchildren live on or use the territory (Exhibit 666A, p. 5).

**4.** With regard to hunting, Mrs. Jack stated the family always did the hunting on the territory. No specific area was cited. She testified that she went hunting on the territory with her father and Chief Louie, but she could not remember the last time she went hunting with Chief Louie, who died in 1951 (Exhibit 666A, p. 6).

**5.** When Mrs. Jack was asked whether the Tahtsa Lake territory was Chief Louie's, she responded,

> "It is their territory but I don't know where — I don't know where his trapline is" (Exhibit 666A, pp. 9-10).

When she was asked about hunting on the territory, she responded,

> "They all go trap in that territory . . ." (Exhibit 666A, p. 9).

**6.** Mrs. Jack stated she never trapped in the area near Mt. Sweeney, otherwise known as Sibola Mountain (Exhibit 666A, p. 7). Yet when she was asked who taught her the territory boundaries, she stated,

> "Ever since I was a little kid we go out trapping all the time and I know the territory" (Exhibit 666A, p. 11).

Mrs. Jack did not know if anyone had trapped the area since 1952 (Exhibit 666A, p. 11).

**7.** Alfred Mitchell testified there were Wet'suwet'en hunters and trappers from the Ootsa Lake area who used this territory, including Chief Louie's son (v. 59, p. 3583). It appears Mr. Mitchell has never been to this territory. Therefore this information is hearsay and is inadmissible.

**8.** Mrs. Jack was asked during re-examination if she had ever fished on the Tahtsa Lake territory. She said that between 1951 and 1952 she fished for trout in the area (Exhibit 666A, p. 13).

**9.** During re-examination Mrs. Jack was asked if she had ever picked berries on the Tahtsa Lake territory and she replied she had picked huckleberries when she had lived there (Exhibit 666A, p. 13).

**10.** Mrs. Jack admitted that in 1952 she asked Keom Morris to come with her to the territory so that she would know that she was on the right territory. This was the last time she went to the territory (Exhibit 666A, pp. 10-11). She admitted that she did not know where her father's "place" was (Exhibit 666A, p. 9). There was no evidence as to where they specifically went on the territory.